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No. (1)

In The
Supreme Court of the United States

STEPHANIE BOWENS, et al.,

Petitioners,

v.

GOVERNOR PAT QUINN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Illinois provides post-conviction procedures for citizens convicted of felonies to apply for executive clemency with records expungement and prescribes that, following a hearing and recommendations by the Prisoner Review Board, the governor "shall decide each application." Does the Due Process Clause of the United States Constitution afford petitioners for executive clemency redress if the governor refuses to decide their applications as required by Illinois law?

PARTIES TO THE PROCEEDINGS

Petitioners (plaintiffs and appellees in the proceedings below) are Stephanie Bowens, James Corbin, Larry Green, Ernest Jones, Kevin Little, Robert Lozano, Albert Pulido, Denise Smith, Charles Thomas, Percy Mack, Eric Love, and Vonda Wallace.

Respondent is Illinois Governor Pat Quinn. On January 29, 2009, the originally named defendant-appellant in this proceeding, former Governor Rod Blagojevich, was removed from office. On February 4, 2009, pursuant to Seventh Circuit Rule 43, Governor Quinn was formally substituted as the defendant-appellant.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, by their undersigned counsel, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit held that individuals convicted of felonies who apply for executive clemency under post-conviction procedures established by Illinois law have no due-process protectable right to seek redress when the governor refuses to comply with a mandatory statutory directive that he decide their applications. The Seventh Circuit's conclusion that obtaining a pardon "would not secure an interest protected by the due process clause" conflicts with decisions of the other courts of appeals. The court's further conclusion that "the Illinois statute [does not] create[ ] a requirement of prompt, or indeed of any, action by the governor on a clemency petition" (App. 7) is irreconcilable with the statutory language that petitioners have a right to a decision – the governor "shall decide each application for [executive clemency]." Decisions of this Court and other courts of appeals hold that due process attaches to such mandatory statutory directives in post-conviction proceedings.

The Seventh Circuit's further statement that due process does not apply to clemency claims at all because clemency is a matter of grace also is contrary to the understandings of other courts of appeals and those expressed by Justices of this Court in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998). Certiorari should be granted to resolve

whether post-conviction, executive clemency procedures instituted by States such as Illinois are sufficiently important so as to implicate the Due Process Clause when a governor refuses to follow a mandatory directive that he act.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals (App. 1-9) is reported at 561 F.3d 671. The opinion of the United States District Court for the Northern District of Illinois (App. 10-23) is unreported and available at 2008 WL 4378823 (N.D. Ill. Mar. 11, 2008).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 2, 2009. On June 24, 2009, Justice Stevens granted petitioners an extension of time to file this petition until Sunday, August 30, 2009 (making this petition due Monday, August 31, 2009, pursuant to Supreme Court Rule 30.1); this case was given number 08A1152. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> The Governor shall decide each application [for executive clemency] and communicate his decision to the [Illinois Prisoner Review] Board which shall notify the petitioner . . .

730 Ill. Comp. Stat. 5/3-3-13(d) (App. 26).

> The Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law.

ILL. CONST. ART. V § 12 (App. 24).

> No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law.

U.S. CONST. amend. XIV, § 1.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. Illinois Law Bars Individuals Convicted Of Felonies From Many Privileges Of Citizenship, And Affords A Post-Conviction Procedure For Rehabilitated Individuals To Regain Those Privileges.

Illinois (like many states), the City of Chicago and Cook County have statutes or ordinances that bar individuals convicted of felonies from holding numerous occupations, obtaining cash assistance under welfare programs, serving as an executor of a will or administrator of an estate, obtaining numerous kinds of licenses and certifications, running certain kinds of businesses and holding municipal office. *See* 305 Ill. Comp. Stat. 5/1-10(a) (prohibiting individuals convicted of certain drug felonies from receiving cash assistance under Illinois' public aid program); 755 Ill. Comp. Stat. 5/6-13(a), 5/9-1 (prohibiting felons from serving as executors of a will or administering estates); 225 Ill. Comp. Stat. 46/25 (prohibiting persons convicted of certain offenses from certain health occupations); 225 Ill. Comp. Stat. 10/4.2(b) (prohibiting persons convicted of certain offenses from licensure and employment in child care facilities); 105 Ill. Comp. Stat. 5/10-21.9(c), 5/34-18.5(c) (prohibiting persons convicted of certain offenses from employment at public schools); 70 Ill. Comp. Stat. 1205/8-23(c) (prohibiting persons convicted of certain offenses from employment with the park district); 55 Ill. Comp. Stat. 5/3-6001.5(3) (prohibiting felons from

serving as sheriff); 65 Ill. Comp. Stat. 5/3.1-10-5(b) (prohibiting felons from holding municipal office).[1]

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[1] *See also* COOK COUNTY, ILL., ORDINANCES ch. 54, art. IX, § 365 (prohibiting felons from running raffles); COOK COUNTY, ILL., ORDINANCES ch. 54, art. III § 152(e) (prohibiting felons from obtaining a deadly weapons dealer license or gun show permit); COOK COUNTY, ILL., ORDINANCES ch. 54, art. II, § 63(c) (prohibiting a felon from obtaining a roadhouse license); CHICAGO, ILL. MUNICIPAL CODE ch. 4-60, §§ 030(e)-(g), (n)-(o), (t) (prohibiting the licensing of persons convicted of certain felonies as liquor dealers); CHICAGO, ILL. MUNICIPAL CODE ch. 4-64 art. III, § 280 (prohibiting the licensing of persons convicted of certain felonies to obtain a cigarette-vending machine operator's license); CHICAGO, ILL. MUNICIPAL CODE ch. 4-72, § 070(D) (allowing for the revocation of a day care operator's license for conviction of a felony and certain misdemeanors).

Under state law, individuals convicted of felonies also may be denied licenses necessary for numerous occupations. *See* 225 Ill. Comp. Stat. 70/17(a)(2) (operating a nursing home); 225 Ill. Comp. Stat. 65/70-5(b)(3) (nursing); 225 Ill. Comp. Stat. 315/18.1(a)(3) (landscape architect); 225 Ill. Comp. Stat. 2/110(a)(2) (acupuncturist); 225 Ill. Comp. Stat. 458/15-10(a)(4) (real estate appraiser); 765 Ill. Comp. Stat. 101/15-25(2) (timeshare agent); 225 Ill. Comp. Stat. 20/19(1)(c) (social worker); 225 Ill. Comp. Stat. 15/15(1) (psychologist); 225 Ill. Comp. Stat. 80/24(a)(2) (optometrist); 225 Ill. Comp. Stat. 106/95(a)(3) (respiratory care practitioner); 225 Ill. Comp. Stat. 335/9.1(b) (roofing contractor); 225 Ill. Comp. Stat. 454/20-20(b) (real estate agent); 225 Ill. Comp. Stat. 75/19(a)(3) (occupational therapist); 225 Ill. Comp. Stat. 84/90(a)(3) (orthotist); 225 Ill. Comp. Stat. 55/85(a)(3) (marriage and family therapist); 225 Ill. Comp. Stat. 450/20.01(a)(11) (public accountant); 225 Ill. Comp. Stat. 447/40-10(a)(4) (locksmith or private detective); 225 Ill. Comp. Stat. 305/22(a)(6) (architect); 225 Ill. Comp. Stat. 5/16(C) (athletic trainer); 225 Ill. Comp. Stat. 330/27(a)(3) (surveyor); 225 Ill. Comp. Stat. 135/95(3) (genetic counselor); 225 Ill. Comp. Stat. 410/4-7(1)(a) (barber, cosmetologist, esthetician or nail

(Continued on following page)

At the same time, Illinois law also specifies limited circumstances in which rehabilitated individuals can apply for executive clemency and pardons, clear their records, and fully re-engage as productive, tax paying citizens. *See* Ill. Const. Art. V, § 12; 730 Ill. Comp. Stat. 5/3-3-13 ("Section 3-3-13"); 20 Ill. Adm. Code § 1610.180; 20 Ill. Comp. Stat. 2630/5(c) (App. 24-25, 28, 36).

Under the Illinois Constitution, the governor has the sole power to "grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law." Ill. Const. Art. V, § 12 (App. 24). Based on this constitutional authorization, the Illinois legislature enacted Section 3-3-13. The statutes recognize that "[n]othing in this

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technician); 225 Ill. Comp. Stat. 30/95(1)(c) (dietitian); 225 Ill. Comp. Stat. 325/24(a-1)(3) (engineer); 225 Ill. Comp. Stat. 41/15-75(b)(2) (funeral director or embalmer); 225 Ill. Comp. Stat. 745/80(a)(3) (geologist); 225 Ill. Comp. Stat. 310/13(h) (interior designer); 225 Ill. Comp. Stat. 85/30(a)(14) (pharmacist).

For still other occupations, while not outcome-determinative, an individual's felony conviction is a factor considered in licensing. *See* 225 Ill. Comp. Stat. 605/5 (pet store operator); 225 Ill. Comp. Stat. 110/8.5(1) (speech pathologist); 225 Ill. Comp. Stat. 130/45(2) (surgical assistant); 225 Ill. Comp. Stat. 115/8(4) (veterinarian); 225 Ill. Comp. Stat. 415/11(A)(2) (shorthand reporter); 225 Ill. Comp. Stat. 90/8(a)(1) (physical therapist); 225 Ill. Comp. Stat. 125/30(2) (perfusionist); 225 Ill. Comp. Stat. 57/15(a)(2) (massage therapist); 225 Ill. Comp. Stat. 105/11 (professional boxer); 225 Ill. Comp. Stat. 412/30(2) (electrologist).

Section shall be construed to limit the power of the Governor under the constitution to grant a reprieve, commutation of sentence, or pardon." 730 Ill. Comp. Stat. 5/3-3-13(e) (App. 27). Section 3-3-13(d), however, contains a mandatory directive that the governor must decide the applications that come to his desk: "The Governor *shall decide* each application and communicate his decision to the [Prisoner Review] Board which shall notify the petitioner." 730 Ill. Comp. Stat. 5/3-3-13(d) (emphasis added) (App. 26).

Under the Illinois scheme, the Prisoner Review Board ("PRB") is charged with receiving clemency applications and holding hearings on those applications. 730 Ill. Comp. Stat. 5/3-3-13 (App. 25-26). Various rules govern what clemency petitions must contain and how they are to be submitted. 20 Ill. Adm. Code § 1610.180(a)-(d) (App. 28-30). Notice obligations are imposed upon the PRB, and a docket must be prepared for each PRB meeting listing all petitions, not previously addressed, that were filed 30 days or more before the date of the meeting. 730 Ill. Comp. Stat. 5/3-3-13(b); 20 Ill. Adm. Code § 1610.180(e) (App. 25, 30). The PRB is required to give a hearing to each applicant (allowing for representation by counsel), to hold at least four meetings per year to consider petitions, and to provide a confidential, written recommendation to the governor on each petition based upon majority vote. 730 Ill. Comp. Stat. 5/3-3-13(c); 20 Ill. Adm. Code § 1610.180(f)-(h) (App. 26, 30-31). The PRB's budget for the fiscal year ending June 30, 2008, for clemency and other matters

under its purview (such as parole release and parole revocation) was $1,421,900. Pub. Act 95-0349, eff. August 23, 2007.

If a petition is denied by the governor, each applicant has a right to reapply for clemency after one year has elapsed. *See* 730 Ill. Comp. Stat. 5/3-3-13(a-5) (App. 25). Should the governor act favorably on a petition and grant a pardon, he may authorize the petitioner's criminal records to be expunged. *See* 20 Ill. Comp. Stat. 2630/5(c) (allowing a pardoned individual to petition for expungement "[w]henever a person who has been convicted of an offense is granted a pardon by the Governor which specifically authorizes expungement.") (App. 36). As a result of expungement, all of the prohibitions under Illinois law barring employment, license and certificate holding, the ability to hold municipal office, etc., no longer apply. *See* 20 Ill. Comp. Stat. 2630/12(a) (providing that except for "law enforcement agencies, the Department of Corrections, State's Attorneys, or other prosecutors, and as provided in Section 13 of this Act, an expunged or sealed record may not be considered by any private or public entity in employment matters, certification, licensing, revocation of certification or licensure, or registration."). And individuals whose records have been expunged are affirmatively protected from discrimination based on the stigma of their felony convictions. *See* 775 Ill. Comp. Stat. 5/2-103(A).

B. Petitioners Applied For Executive Clemency, The PRB Held Hearings On Their Applications, And Then-Governor Blagojevich Refused To Decide Petitioners' Applications.

Petitioners, plaintiffs in this lawsuit, are low-income Illinois citizens who were convicted (many through guilty pleas) of felony crimes long ago, in some cases in the 1970s or 1980s when they were teenagers or in their 20's. (App. 51-60, ¶¶ 12, 15-38). Since then, each petitioner has demonstrated through civic, family and other means a commitment to become a fully-engaged, productive citizen. (App. 52-60, ¶¶ 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38). However, petitioners daily confront the legal constraints imposed on them barring job holding in many specified occupations, obtaining licenses, running for municipal office, obtaining cash welfare assistance, etc. Because they are required to identify their felony convictions to employers and potential employers, their ability to be employed at all is severely impaired. (*Id.*).

Petitioners sought the assistance of a Chicago-based legal aid clinic, Cabrini Green Legal Aid ("CGLA"). (App. 51-52, ¶ 14). CGLA's intake criteria require that (1) a prescreening review of each client's rap sheet take place, followed by an extensive, detailed interview; (2) its clients have not been convicted of an offense in Cook County, Illinois or have been released from incarceration for (in most cases) at least 10 years; (3) its clients have no or insignificant intervening arrests; (4) its clients have

had a significant life change since their convictions; and (5) its clients have specific examples of continuing adverse consequences caused by their convictions. (*Id.*). Each applicant must also provide an account of his/her education and employment history, community activity, family history, substance abuse history, and a factual statement regarding the offense(s) for which he/she seeks clemency. (*Id.*).

With CGLA's assistance, petitioners applied for executive clemency between 2002 and 2005. (App. 52-60, ¶¶ 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37). Each had his or her requisite hearing before the PRB. (*Id.*). The PRB made and communicated a recommendation to then-Governor Blagojevich on each clemency petition – with the sole remaining step that the governor decide their applications for clemency.

Governor Blagojevich refused to decide the petitioners' applications. (App. 62, ¶ 44). After litigation was filed concerning his refusals, he attempted to make the lawsuit moot by deciding the applications of the original nine plaintiffs (denying eight, granting one), but three more plaintiffs who also had hearings before the PRB were added as plaintiffs. (App. 50, ¶ 11). For the nine, the governor's decisions were issued from two (in one case) to four and one-half years after the dates the clemency petitions were filed, and up to four years after the dates of the PRB hearings. (App. 50, 52-60, 62, ¶¶ 11, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 44). Before he was forced from office in January 2009 (while his appeal from the district court decision in this case was pending),

Governor Blagojevich still had not decided the petitions of three plaintiffs (Mack, Love, and Wallace), which were filed in 2003 and 2004. (App. 50, 58-60, 62, ¶¶ 11, 33, 35, 37, 44). As of July 2006 (about two months before the first complaint in this matter was filed), there were almost 2,000 pending clemency petitions awaiting the governor's decision. (App. 50, ¶ 9).

C. The Proceedings Below.

In September 2006, petitioners filed suit in the United States District Court for the Northern District of Illinois pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343, challenging the governor's refusal to make *any* ruling on their clemency petitions in violation of Illinois law that he "shall decide." After the governor had filed several motions to dismiss and attempted to render the controversy moot when he denied eight of the original nine plaintiffs' clemency petitions and granted one, the district court denied the governor's third motion to dismiss, holding that plaintiffs stated a due process claim under 42 U.S.C. § 1983.

The district court viewed "[t]he question before the court [a]s whether [730 Ill. Comp. Stat. Section] 5/3-3-13 creates a liberty interest that would trigger a constitutional violation if fair procedures were not followed when depriving plaintiff of that interest." (App. 13-14). According to the district court, "the Illinois legislature has placed no restrictions on the Governor's discretion whether to grant or deny an

individual's application for clemency. But it *has* placed, in [Section 3-3-13], an unambiguous restriction on the Governor's putative discretion whether to make *any* decision at all." (emphasis in original) (App. 14). Relying on *Hewitt v. Helms,* 459 U.S. 460, 471 (1983) and other precedents, the district court found that this "statutory language is unequivocal: the Governor '*shall decide* each application and communicate his decision to the Board which shall notify the petitioner.'" (emphasis in original) (App. 15).

The district court held that "the Illinois legislature has thus created a procedural due process liberty interest in the procedures governing when and how a clemency position [sic] is made once the PRB has submitted its report to the Governor." (App. 15). Section 3-3-13 "explicitly and unequivocally requires that *some* decision *shall* be made, and it is therein that the state has created a liberty interest protected by the Due Process Clause." (emphasis in original); (App. 15-16). The district court further held that "although [Section 3-3-13] does not specify a time period in which the Governor must make a decision on clemency petitions following submission of the PRB's recommendation, the necessary implication of the statute's imperative language is that the decision be made within a reasonable period of time." (App. 16). Consequently, "plaintiffs have alleged claims sufficient to establish a protectable liberty interest in having a decision made concerning their clemency

petitions within a reasonable period of time subsequent to the PRB's recommendation." (App. 17).

On interlocutory appeal under 28 U.S.C. § 1292(b), the Seventh Circuit reversed and dismissed the lawsuit, finding that "plaintiffs have no good constitutional claim." *Bowens v. Quinn*, 561 F.3d 671, 673 (7th Cir. 2009) (App. 3). Though Illinois law makes it mandatory that the governor "shall decide" clemency petitions, the Seventh Circuit stated that "[w]e do not even think that the Illinois statute creates a requirement of prompt, or indeed of any, action by the governor on a clemency petition." *Id.* at 675 (App. 7). Furthermore, in this case, "[i]f [petitioners] obtained a pardon it would not secure an interest protected by the due process clause." *Id.* at 674 (App. 4).

The court did not consider that its conclusion is punitive and contrary to the express policy of Illinois to rehabilitate ex-offenders, or that making the clemency procedure toothless would affirmatively discourage the efforts of ex-offenders to rehabilitate. Rather, were the federal court ordered to grant petitioners the relief they sought (a reasonably timely decision on their applications), "[e]very felon in the state would apply for a pardon knowing that, with all applying, the governor's office, overwhelmed, would be unable

to process the applications within the deadline set by the court . . . " *Id.* at 676 (App. 9).[2]

REASONS FOR GRANTING THE PETITION

Illinois withdraws liberty and property rights from individuals convicted of felonies, but also provides a post-conviction process that can result in the full restoration of these rights. The Seventh Circuit's holding that the restorable liberty and property interests of clemency applicants and the mandatory requirement imposed on the governor to decide clemency applications fail to raise due process-protectable interests is contrary to the decisions of this Court and to the other courts of appeals.

This Court and the other courts of appeals have held that state law can create due process-protected liberty interests in post-conviction proceedings. This Court has debated the application of due process in clemency cases, *see Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272 (1998), and other courts of appeals have found that due process principles apply to clemency proceedings. The Court should grant review to resolve the conflicts this case presents over

[2] The Seventh Circuit also noted that the formal expungement of records is technically a separate step in Illinois after receiving a pardon. *Bowens*, 561 F.3d at 674 (App. 5). This second step of expungement is largely ministerial. *See* 20 Ill. Comp. Stat. 2630/5(c) (expungement follows if the individual is first "granted a pardon by the Governor.") (App. 36).

the application of due process principles to post-conviction clemency proceedings.

A. Illinois' Clemency Procedure Can Secure Interests Protected By The Due Process Clause, As Other Courts Of Appeals Have Determined.

The governor's refusal to comply with Illinois clemency law means that petitioners remain subject to the state laws and municipal ordinances that bar them, as individuals convicted of felonies, from employment in numerous occupations, from obtaining licenses and certificates, from seeking municipal office, from receiving cash welfare benefits and from possessing firearms. Through the clemency process, Illinois provides the statutory mechanism for wiping the slate clean and restoring all of these liberties, and affirmatively makes it unlawful to discriminate against any individual who has been pardoned with records expungement. *See* 20 Ill. Comp. Stat. 2630/12(a); 775 Ill. Comp. Stat. 5/2-103(A).

The other courts of appeals have repeatedly recognized that these types of interests are protectable. The Seventh Circuit's belief that the Illinois' clemency process does not secure protectable interests rested in part on its assumption (not asserted by the governor) that reputational benefits of obtaining gainful employment are unprotected by the Due Process Clause. *Bowens*, 561 F.3d at 675 (App. 6); *e.g.*, *Siegert v. Gilley*, 500 U.S. 226, 233-35 (1991).

Certainly petitioners' reputations are an interest they value, but as other courts of appeals have recognized, when liberty-related burdens to obtaining employment are also present, as here, due process considerations take hold and are protectable. *See Humphries v. County of Los Angeles*, 554 F.3d 1170, 1188 (9th Cir. 2009) ("where a state statute creates both a stigma [falsely labeled child abuser] and a tangible burden on an individual's ability to obtain a right or status recognized by state law, an individual's liberty interest has been violated"); *Valmonte v. Bane*, 18 F.3d 992, 1001 (2nd Cir. 1994) (due process protections attach where stigma of being wrongfully placed on suspected child abuser list "places a tangible burden on [plaintiff's] employment prospects" and "by *operation of law*, her potential employers will be informed specifically about her inclusion on the Central Register and will therefore choose not to hire her") (emphasis in original); *Doe v. U.S. Dep't of Justice*, 753 F.2d 1092, 1104-05 (D.C. Cir. 1985) ("Taking the plaintiff's factual allegations as true, we now find that the stigmatizing nature of [defendant]'s charges, [plaintiff's] discharge, and *the subsequent foreclosure of future employment opportunities*, including government job opportunities, combined to deprive [plaintiff] of a constitutionally protected liberty interest in reputation without due process.") (emphasis added). Individuals pardoned with expungement not only have a right under Illinois law to have their felony stigma and the burdens it imposes removed, they become re-eligible for a host of employment opportunities and Illinois law affirmatively

makes it a discrimination offense to bar such individuals from employment.

Petitioners similarly hold liberty interests in regaining entitlement to welfare benefits that Illinois has taken from them. *See Daniels v. Woodbury Cnty., Iowa*, 742 F.2d 1128, 1132-33 (8th Cir. 1984) (holding welfare applicants had a due process protectable property interest in their benefits as the statutory language was mandatory, stating that the County "shall" provide for the relief of poor persons); *Griffeth v. Detrich*, 603 F.2d 118, 121-22 (9th Cir. 1979) (same). And they also have strong interests in removing the licensing and certification restrictions imposed on them with their convictions. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) (recognizing due-process protected interest in government-issued drivers licenses); *Spinelli v. City of New York*, ___ F.3d ___ (2nd Cir. Aug. 7, 2009) (protected property interest in New York City gun dealer license); *Kratt v. Garvey*, 342 F.3d 475, 483 (6th Cir. 2003) (pilot's license); *Richardson v. Town of Eastover*, 922 F.2d 1152, 1158 (4th Cir. 1991) (property interest in license to operate a nightclub); *Delahoussaye v. Seale*, 788 F.2d 1091, 1094-96 (5th Cir. 1986) (agricultural warehouse license); *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983) (liberty interest in license to operate a barbershop); *Fitzgerald v. Mountain Laurel Racing, Inc.*, 607 F.2d 589, 601 (3rd Cir. 1979) (recognizing due process-protected interest in state license to train and drive horses); *Tollett v. Laman*, 497 F.2d 1231,

1233-34 (8th Cir. 1974) (due process applies to revocation of trailer park license).

Perhaps most fundamentally, the Illinois statutes explicitly link restoration of the right to run for public office with the clemency/pardon process invoked by petitioners. *See* 10 Ill. Comp. Stat. 5/29-15 ("any person convicted of an infamous crime . . . shall thereafter be prohibited from holding any office of honor, trust, or profit, *unless* such person is again restored to such rights *by the terms of a pardon* for the offense or otherwise according to law" (emphasis added);[3] *cf.* 18 U.S.C. § 921(a)(20) (recognizing effects of pardon on limitations relating to firearms). Contrary to the Seventh Circuit's view that petitioners' interest in clemency is non-substantive and insufficiently weighty, numerous courts hold otherwise and this Court should grant review to make explicit that such interests are protectable when raised in a post-conviction, clemency process.

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[3] *See Bryant v. Bd. of Election Com'rs of City of Chicago*, 224 Ill. 2d 473, 474 (Ill. 2007) (noting the Municipal Code's bar on a felon's eligibility for an elective municipal office "is not necessarily permanent," as the Election Code provides "felons may recover their right to run for office through 'the terms of a pardon for the offence or otherwise according to law' "); *Coles v. Ryan*, 91 Ill. App. 3d 382, 384 (Ill. App. 1980) ("eligibility to hold an office created by the legislature is not restored, even after completion of sentence unless a person has been pardoned for the offense and the terms of the pardon provide for such restoration.").

B. The Seventh Circuit's Decision Conflicts With Precedents Of This Court And The Other Courts Of Appeals Holding That Mandatory Statutory Language, As Here, Creates Due Process-Protected Expectations In Post-Conviction Proceedings.

This Court has "repeatedly held that state statutes may create [post-conviction] liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (involuntary transfer of prisoners to a mental hospital). Though the Seventh Circuit believed that Illinois' "shall decide" directive fails to "create[ ] a requirement of prompt, or indeed of any, action by the governor on a clemency petition," *Bowens*, 561 F.3d at 675 (App. 7), liberty interests are created when a statute or regulation uses "language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed." *Hewitt v. Helms*, 459 U.S. 460, 471 (1983) (removal of prison inmates from general prison population to administrative segregation); *see also Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) ("the prisoner's interest [in good time credits] has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.").

In *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979), the Court focused on the mandatory language of Nebraska's parole statutes to find a protectable expectation of parole. *Id.* at 11-12. Those statutes provided that the Board of Parole "shall order" release unless certain factors were present, and the Court determined that this statute – "with the use of the word 'shall,'" – created an expectation of release entitled to constitutional protection (though ultimately held that all process due was provided). *Id.* at 11-12, 16.

The other courts of appeals have regularly applied the principle that state law through mandatory language can create due process-protected liberty interests in post-conviction and related proceedings. *See, e.g.*, *Lainer v. Fair*, 876 F.2d 243, 248, 253 (1st Cir. 1989) (holding that Massachusetts law, through the use of a detailed set of criteria, conferred due process rights upon plaintiff's transfer from a halfway house to higher custody and upon the rescission of plaintiff's "reserve parole date"); *Klos v. Haskell*, 48 F.3d 81, 86 (2nd Cir. 1995) ("A state may confer enforceable liberty interests on prisoners through its enactment of statutory or regulatory measures which place substantive limitations on prison officials' discretion."); *Teague v. Quarterman*, 482 F.3d 769, 776-77 (5th Cir. 2007) (recognizing that Texas law, through a "mandatory supervision scheme," creates a constitutional expectancy of a prisoner's early release and, as such, a protected liberty interest in previously earned good-time credits entitled to due

process protections); *Gibson v. McMurray*, 159 F.3d 230, 233 (6th Cir. 1998) (recognizing that state law can create a liberty interest protected by the Due Process Clause if the statute uses explicit mandatory language, and mandates a specific outcome if the substantive predicates are met); *Sass v. California Bd. of Prison Terms*, 461 F.3d 1123, 1127-28 (9th Cir. 2006) (finding California statute's use of mandatory language created constitutionally recognized interest in parole); *Coleman v. Alabama*, 827 F.2d 1469, 1474-75 (11th Cir. 1987) (Alabama statute's mandatory language conferred due process right to be informed of the right to request youthful offender treatment).

That the governor retains a measure of discretion (whether to grant or deny clemency) does not change the outcome under *Greenholtz*, as the Seventh Circuit believed. *Bowens*, 561 F.3d at 673-74 (App. 3-4). As with the Nebraska parole statute in *Greenholtz*, Section 3-3-13 is explicit and mandatory in cabining the governor's authority by requiring that a decision on clemency "shall" be made. The Court in *Greenholtz* recognized a liberty interest based on mandatory language even though the Nebraska statute at issue was "necessarily subjective in part and predictive in part" and "vests very broad discretion" in the parole board. *Greenholtz*, 442 U.S. at 13.

Under these cases and principles, petitioners have a due process right to a decision by the governor on their petitions. Illinois was not required to establish a clemency system for its citizens (nor Nebraska with parole), but in doing so Illinois created

an expectation of a clemency decision (the governor "shall decide") that could lead to the restoration of liberty and property entitlements protected by the Due Process Clause. *See generally Winsett v. McGinnes*, 617 F.2d 996, 1006-07 (3rd Cir. 1980) (Delaware Department of Corrections' regulations, which delineated specific benchmarks, established a liberty interest in prisoner work release, notwithstanding prison authorities' discretion in this area).

Nor does *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981), support the Seventh Circuit's position, as the court believed. *Bowens*, 561 F.3d at 673-74 (App. 3-4). To the contrary, *Dumschat* actually supports the petitioners here. In *Dumschat*, the question presented was "whether the fact that the Connecticut Board of Pardons has granted approximately three-fourths of the applications for commutation of life sentences creates a constitutional 'liberty interest' or 'entitlement' in life-term inmates so as to require that Board to explain its reasons for denial of an application for commutation." *Dumschat*, 452 U.S. at 459.

This Court found that no liberty interest was at stake, because "[n]o matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections." *Dumschat*, 462 U.S. at 465. Rather, as *Greenholtz* had already made clear, "[t]he ground for a constitutional claim, if any, *must be found in statutes or other rules defining the obligations of the authority charged with exercising*

clemency." *Id.* (emphasis added). The *Dumschat* court found that the Connecticut statute at issue "imposes no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied by the Board." *Id.* at 466. This statute, the Court noted, "*contrasts dramatically with the Nebraska statutory procedures in Greenholtz* . . . [t]he Connecticut commutation statute, having no definitions, no criteria, and no mandated 'shalls,' creates no analogous duty or constitutional entitlement." *Id.* (emphasis added). Because the Connecticut legislation had no such mandatory language or criteria (unlike Illinois), there was no basis for invoking the Due Process Clause.

C. The Court Should Also Grant Review To Determine Whether Substantive Rights Attaching To Clemency Proceedings Are Any Less Entitled To Protection Than Those Attaching To Other Post-Conviction Proceedings.

The Seventh Circuit also suggested that clemency can never implicate the Due Process Clause: "[t]here is no Fourteenth Amendment property or liberty interest in obtaining a pardon in Illinois – no substantive entitlement, in other words – and so no ground for a claim of denial of due process." *Bowens*, 561 F.3d at 673 (App. 3). "[T]he only reason [petitioners] want a decision is that it is their only hope of getting a pardon, and if they obtained a pardon it would not

secure an interest protected by the due process clause." *Id.* at 674 (App. 4).

The Seventh Circuit's conclusion appears to conflict with the views of at least five of the nine Justices in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998). This case is an appropriate vehicle for this Court to consider whether, as other courts of appeals have decided, a right to be considered for clemency, in itself, is protected by the Due Process Clause.

In *Woodard*, a capital case, this Court addressed whether an inmate had a protected life or liberty interest in clemency proceedings. *Woodard*, 523 U.S. at 275. Woodard sued under 42 U.S.C. § 1983 on the grounds that Ohio's clemency processes violated his Fourteenth Amendment right to due process because they provided insufficient notice for a clemency interview and did not allow for participation by counsel. *Id.* at 277. No issue was presented, as in *Greenholtz,* that a decision-maker failed to abide by a mandatory statutory requirement to act.

Chief Justice Rehnquist, writing for the four-justice plurality, reasoned, as did the Seventh Circuit in rejecting Woodard's claim, that the procedural protections sought by Woodard "would be inconsistent with the heart of executive clemency, which is to grant clemency as a matter of grace." *Id.* at 280-81.

Five of nine Justices disagreed. Justice O'Connor's concurrence (joined by Justices Souter, Ginsburg, and Breyer) did "not . . . agree with the suggestion in the

principal opinion that, because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards." *Woodard*, 523 U.S. at 288. Rather, "some *minimal* procedural safeguards apply to clemency proceedings. Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or . . . where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* at 289 (emphasis in original).[4]

Justice Stevens' dissent similarly found unsustainable the plurality's reasoning that "clemency proceedings could *never* violate the Due Process Clause," even if such procedures were "infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence." *Woodard*, 523 U.S. at 290-91 (emphasis in original). "[I]f a state establishes postconviction proceedings, these proceedings must comport with due process." *Id.* at 293. Thus, five of the nine Justices in *Woodard* concluded that clemency proceedings do demand some minimal level of constitutional protection.

Since *Woodard*, the courts of appeals (unlike the Seventh Circuit) have recognized that clemency

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[4] Justice O'Connor concurred in the judgment of the plurality on the basis that Ohio's regulations provided those protections necessary under the Due Process Clause, and therefore a remand was not necessary. *Woodard*, 523 U.S. at 289-90.

proceedings do implicate the Due Process Clause. *See, e.g.*, *Workman v. Summers*, 111 Fed. Appx. 369, 371 (6th Cir. 2004) ("[S]ome minimal procedural safeguards do apply to clemency proceedings regardless of whether the power to grant clemency is solely entrusted to the executive."); *Rohan v. Woodford*, 334 F.3d 803, 813 (9th Cir. 2003) (holding that the Due Process Clause applies to clemency proceedings); *Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003) ("[I]f the state actively interferes with a prisoner's access to the very system that it has itself established for considering clemency petitions, due process is violated."); *Workman v. Bell*, 245 F.3d 849, 852-53 (6th Cir. 2001) (the court's review of clemency proceedings "is to see that there are some minimal procedural safeguards"); *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (reversing a summary judgment order against plaintiff on the ground that a government official was alleged to have deliberately interfered with plaintiff's clemency petition: "The Constitution of the United States does not require that a state have a clemency procedure, but, in our view, *it does require that, if such a procedure is created, the state's own officials refrain from frustrating it* by threatening the job of a witness.") (emphasis added); *Burnsworth v. Gunderson*, 179 F.3d 771, 775 (9th Cir. 1999) (holding that a prison's disciplinary and classification procedures violated Due Process, and recognizing that "a majority of the justices of the Supreme Court [ ] believe that 'some minimal procedural safeguards apply to clemency proceedings'") (citations omitted); *Faulder v. Texas*

Bd. of Pardons & Paroles, 178 F.3d 343, 344-45 (5th Cir. 1999) (finding that the parole board's clemency procedures met the constitutional minimum set forth in *Woodard*); *cf. Gilreath v. State Bd. of Pardons & Paroles*, 273 F.3d 932, 934 (11th Cir. 2001) ("*Accepting that federal due process applies to state clemency proceedings at all*, we understand that the process that would be due is minimal.") (emphasis added).[5]

Petitioners recognize that they do not have a right to a *grant* of clemency, but "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (citations and quotations omitted). The interests they raise are substantial and enforceable based on the mandatory statutory directive to the governor to decide their claims. The Seventh Circuit's decision renders Illinois' requirement that the governor "shall decide each [clemency] application" a nullity. The decision conflicts with *Greenholtz*, *Dumschat* and *Woodard* and the decisions of the other courts of appeals. Using Justice O'Connor's analogy, the Seventh Circuit's decision means that the governor

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[5] Although *Woodard* was a death penalty case, Justice O'Connor's concurrence was not explicitly limited to the death penalty context and did not state that the same principle was inapplicable to other clemency proceedings. *See generally Burnsworth v. Gunderson*, 179 F.3d 771 (9th Cir. 1999) (non-capital case); *Harvey v. Horan*, 285 F.3d 298, 314 (4th Cir. 2002) (Luttig, J. dissenting) (recognizing that Justice O'Connor's concurrence did not distinguish between capital and non-capital prisoners).

not only may flip a coin to decide clemency, he can choose not to flip the coin at all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 31, 2009

In the
United States Court of Appeals
For the Seventh Circuit

No. 08-4153

STEPHANIE BOWENS, *et al.*,

Plaintiffs-Appellees,

v.

PAT QUINN, Governor of Illinois,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 06 CV 04915 – **Joan B. Gottschall**, *Judge.*

ARGUED FEBRUARY 17, 2009 – DECIDED APRIL 2, 2009

Before POSNER, KANNE, and WOOD, Circuit Judges.

POSNER, *Circuit Judge*. Article V, section 12, of the Illinois Constitution provides that "the Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefor may be regulated by law." An Illinois statute establishes procedures for the exercise of this power of executive clemency, and provides that though "nothing in this [statute] shall be construed to limit the power of the

Governor under the constitution to grant a reprieve, commutation of sentence, or pardon, . . . the Governor shall decide each application." 730 ILCS 5/3-3-13(d), (e). The appellees, who were the plaintiffs in the district court, are twelve Illinoisans who filed petitions for executive clemency between 2003 and 2005. Originally there were just nine plaintiffs. But then-Governor Blagojevich, the original defendant, while his motion to dismiss the suit was pending, granted one of the petitions and denied eight, whereupon the plaintiffs amended their complaint to add three new plaintiffs whose petitions for executive clemency had not been acted on.

It might seem that the case would be moot with regard to the nine plaintiffs whose petitions were acted on, since the only relief they seek is an injunction requiring the governor to decide within a reasonable time whether to grant a pardon that has been applied for. But the situation of the eight whose applications were denied is similar to that of a pregnant woman who challenges an abortion law and by the time the case is ready to decide has given birth. Her case is "capable of repetition [she may become pregnant again], yet evading review," *Roe v. Wade,* 410 U.S. 113, 124-25 (1973), quoting *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911); *see also Weinstein v. Bradford,* 423 U.S. 147, 148-49 (1975) (per curiam), and on this ground is held not to be moot. The situation of the eight plaintiffs is similar because each of them can file a new petition for executive clemency after a year has elapsed from

the denial of a previous one, 730 ILCS 5/3-3-13(a-5), and thus would face the prospect of having their next suit rendered moot by another prompt denial. Eventually they would be exhausted from repeated futile suits and would give up, and the governor could then resume his alleged policy of "pocket vetoing" clemency petitions. We conclude that only the claim of the plaintiff whose clemency petition was granted is moot.

The plaintiffs contend that by failing to act on their petitions within a reasonable time, the governors have violated the due process clause of the Fourteenth Amendment. The district court refused to dismiss the case, precipitating this interlocutory appeal. 28 U.S.C. § 1292(b). We think she should have dismissed the case; the plaintiffs have no good constitutional claim.

There is no Fourteenth Amendment property or liberty interest in obtaining a pardon in Illinois – no substantive entitlement, in other words – and so no ground for a claim of denial of due process. This well-established principle of constitutional law, *Olim v. Wakinekona,* 461 U.S. 238, 250-51 (1983); *Villanova v. Abrams,* 972 F.2d 792, 798 (7th Cir. 1992), was applied to pardons in *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458, 464 (1981), where the Court pointed out that "a decision whether to commute a long-term sentence generally depends not simply on objective factfinding, but also on purely subjective evaluations and on predictions of future behavior by those entrusted with the decision. A commutation

decision therefore shares some of the characteristics of a decision whether to grant parole. *See Greenholtz [v. Inmates of Nebraska Penal & Correctional Complex,* 442 U.S. 1, 9-10 (1979)]. Far from supporting an 'entitlement,' *Greenholtz* therefore compels the conclusion that an inmate has 'no constitutional or inherent right' to commutation of his sentence." (To the same effect, *see Ohio Adult Parole Authority v. Woodard,* 523 U.S. 272, (1998), and *Woratzeck v. Arizona Board of Executive Clemency,* 117 F.3d 400, 403-04 (9th Cir. 1997).) The Illinois governor's power of pardon is plenary; no substantive limitation is imposed by the state constitution or by any other source of state law. Cf. *Miller v. Henman,* 804 F.2d 421, 424-25 (7th Cir. 1986); *Huggins v. Isenbarger,* 798 F.2d 203, 206 (7th Cir. 1986) (per curiam).

The plaintiffs try to sidestep *Dumschat* by arguing that they are claiming an entitlement not to a pardon but merely to a reasonably prompt decision on their application, which they contend is a real "entitlement" because it invokes a statutory command (the Governor *shall* decide whether to grant the pardon) rather than merely seeking an exercise of uncanalized discretion. But the only reason they want a decision is that it is their only hope of getting a pardon, and if they obtained a pardon it would not secure an interest protected by the due process clause. The grant of a pardon must not be confused with restoration of freedom. The plaintiffs completed their sentences long ago. They want pardons because they have trouble finding and holding jobs, and they

have that trouble because they have to tell employers, if the employers ask, that they are felons. This quandary would be relevant to their quest for jobs (including promotions) only if a pardon would wipe the slate clean, ending their status as felons. In general that is not true, at least in Illinois. "[A] pardon implies guilt; it does not obliterate the fact of the commission of the crime and the conviction thereof." *Talarico v. Dunlap*, 685 N.E.2d 325, 327 (Ill. 1997). "'The granting of a pardon does not expunge the record [of conviction].'" *People v. Glisson*, 372 N.E.2d 669, 670 (Ill. 1978), quoting the Illinois Clemency Rules Book.

The governor can, it is true, grant a pardon that explicitly authorizes expungement of the applicant's conviction upon application to a court, 20 ILCS 2630/5(c), and the grant of the application would bar prospective employers from considering the expunged conviction, 20 ILCS 2630/12(a). But the court to which the application for expungement is made after the governor acts is not required to grant it; the application is merely a request that the court exercise discretion in the applicant's favor. *People v. Howard*, 2009 WL 711121 (Ill. Mar. 19, 2009). Anyway the plaintiffs don't tell us whether they sought such a pardon, as they could have done by checking a box on the application form, www.state.il.us/prb/docs/clempetition.pdf (visited Mar. 20, 2009), or sought merely the normal general pardon, which does not lead to expungement. There are also pardons based on a determination that the applicant was innocent of

the crime of which he was convicted, *People v. Chiappa,* 368 N.E.2d 925, 926-927 (Ill. 1977), but our plaintiffs do not claim to have been innocent, so we need not consider the effect of such a pardon either.

And though having a criminal record does reduce a person's job opportunities by impairing his reputation for good character, reputation is not a property or liberty interest within the meaning of the due process clauses of the federal Constitution. *Siegert v. Gilley,* 500 U.S. 226, 233-35 (1991); *Paul v. Davis,* 424 U.S. 693, 710-12 (1976); *Brown v. City of Michigan City,* 462 F.3d 720, 729-32 (7th Cir. 2006); *Mosrie v. Barry,* 718 F.2d 1151, 1158-62 (D.C. Cir. 1983). Even if it were, this would not help the plaintiffs because they don't contest the convictions that injured their reputations, and this implies that they had in their criminal proceedings adequate process to try to protect their reputations from being sullied by a criminal conviction.

They do not claim to be seeking pardons in order to remove statutory disabilities, either, such as the right to vote or to hold public office; anyway most statutory disabilities resulting from a felony conviction are restored automatically upon the completion of the defendant's sentence, *see* Margaret Colgate Love, "Relief from the Collateral Consequences of a Criminal Conviction (Illinois)," January 2007, www.sentencingproject.org/tmp/File/Collateral%20Consequences/Illinois(2).pdf (visited Mar. 20, 2009), and others can be restored by administrative fiat. *See*, e.g., 730 ILCS 5/5-5.5-5 *et seq.*

And while a requirement of prompt action on a petition for a pardon may sometimes benefit the applicant, if the alternative would be a pocket veto, it is not a *substantive* entitlement; otherwise any time a state official failed to act within a prescribed period of time he would be deemed to have violated the federal Constitution. That cannot be correct, as only substantive entitlements are protected by the due process clauses. Unless compliance with a procedural requirement secures a substantive entitlement, the failure to comply with it does not invade an interest protected by the due process clauses. "The executive's clemency authority would cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural requirements that respondent urges." *Ohio Adult Parole Authority v. Woodard, supra,* 523 U.S. at 285.

We do not even think that the Illinois statute creates a requirement of prompt, or indeed of any, action by the governor on a clemency petition. The statute merely describes steps in the sequence of procedures in clemency matters. There is first the petition, then consideration of it by the Prisoner Review Board, then "the Governor shall decide each application and communicate his decision to the Board which shall notify the petitioner," and there are further steps after that. 730 ILCS 5/3-3-13. Unless and until the governor decides the application and communicates his decision to the Board, the further steps are pretermitted.

If this is wrong and the statute does require the governor to make a decision, still, it does not specify a time limit. It might seem that a "reasonable" time could be implied, as is done in contracts that do not specify a deadline for performance. E. Allan Farnsworth, *Contracts* § 3.28, p. 205 (4th ed. 2004); *Restatement (Second) of Contracts* § 204, comment d (1981); *Rose v. Mavrakis,* 799 N.E.2d 469 (Ill. App. 2003); *Meyer v. Marilyn Miglin, Inc.,* 652 N.E.2d 1233, 1239 (Ill. App. 1995). But we have no idea what a "reasonable" time for deciding a clemency petition would be. It would depend on the number of petitions, which must vary from year to year (we have data only for 2005, when 713 clemency petitions were filed; the governor granted 1 and denied 31, and so 681 were left undecided), and on the other tasks besides reviewing recommendations for clemency forwarded to him by the Prisoner Review Board to which a governor must attend.

Executive clemency is a classic example of unreviewable executive discretion because it is one of the traditional royal prerogatives (along with receiving foreign ambassadors and commanding the armed forces) borrowed by republican governments for bestowal on the head of government. U.S. Const., art. II, § 2, cl. 1; *Schick v. Reed,* 419 U.S. 256, 260-66 (1974); *Ex parte Grossman,* 267 U.S. 87, 108-10 (1925); John Harrison, "Pardon as Prerogative," 13 *Fed. Sentencing Rptr.* 147 (2001) ("seeing the pardon power as a bit of the royal prerogative dropped into our generally law-bound constitutional system provides a

perspective on the actual and possible functions of that power"). We therefore balk at the idea of federal judges' setting timetables for action on clemency petitions by state governors.

And what sanction could a federal court impose for noncompliance with any "reasonable time" deadline that the court might set? Would it be to grant the pardon? If so, the governor's office would be overwhelmed. Every felon in the state would apply for a pardon knowing that, with all applying, the governor's office, overwhelmed, would be unable to process the applications within the deadline set by the court, and so they would be granted by default. Federal courts have run prisons, school systems, police and fire departments, and other state and local agencies found to have engaged in unconstitutional conduct. But for a federal court to run a governor's pardon system would be a step too far.

The ruling by the district court is reversed with instructions to dismiss the suit with prejudice.

REVERSED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEPHANIE BOWENS, JAMES CORBIN, KEVIN LITTLE, ROBERT LOZANO, ALBERT PULIDO, DENISE SMITH, CHARLES THOMAS, PERCY MACK, ERIC LOVE, and VONDA WALLACE, Plaintiffs, v. GOVERNOR ROD BLAGOJEVICH, Defendant.	)	Case No. 06 C 4915 Judge Joan B. Gottschall

MEMORANDUM OPINION AND ORDER

(Filed Mar. 11, 2008)

The plaintiffs in this case are various individuals who have been convicted of past felonies and have sought executive clemency under the Illinois Constitution and 730 ILCS § 5/13-3-13. Plaintiffs have brought suit in this court against Illinois Governor Rod Blagojevich (the "Governor") seeking injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. § 1343. Specifically, the plaintiffs seek an injunction requiring the Governor to act within a reasonable time on the outstanding recommendations of the Illinois Prisoner Review Board ("PRB").

Furthermore, in their amended complaint, the plaintiffs also allege that some of their petitions for clemency were denied by the Governor in retaliation for filing this suit, and they request an injunction requiring the Governor to disclose the reasons for, and processes employed in, the denial of their petitions for clemency. Currently before this court is the Governor's motion to dismiss the case, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. For the reasons set forth below, the Governor's motion to dismiss is denied in part and granted in part.

I. ANALYSIS

A. Standard

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "the complaint need only contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Equal Employment Opportunity Comm'n v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007) (quoting Fed. R. Civ. P. 8(a)(2)). The complaint "must describe the claim in sufficient detail to give the defendant 'fair notice of what the . . . claim is and the grounds upon which it rests' . . . [and] its allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a 'speculative level'; if they do not, the plaintiff pleads itself out of court." *Concentra*, 496 F.3d at 776 (quoting *Bell Atl.*

Corp. v. Twombly, ___ U.S. ___, 127 S. Ct. 1955, 1964, 1973 n.14 (2007)).

B. Section 5/3-3-13 Creates a Protectable Liberty Interest.

The Illinois Constitution of 1970 invests the Governor with the power to "grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper." Ill. Const. Art V, § 12. Moreover, "the manner of applying [for clemency] may be regulated by law." *Id.* The process of applying for executive clemency under the Illinois Constitution is controlled by 730 ILCS § 5/3-3-13 ("§ 5/3-3-13") and Section 1610.180 of the Illinois Administrative Code ("§ 1610.180"). Briefly, written and signed petitions from individuals seeking executive clemency are reviewed by the PRB. The PRB then determines, by majority vote, what will be its recommendations to the Governor, who is then notified via a written report without publicity. Ill. Admin. Code tit. 20, § 1610.180 (2007). If a petition is denied by the Governor, the Board may not consider another petition from the same petitioner until a full year has elapsed from the date of denial. 730 ILCS § 5/3-3-13(a-5) (2007). However, none of the administrative procedures enacted by the legislature "shall be construed to limit the power of the Governor under the constitution to grant a reprieve, commutation of sentence, or pardon." 730 ILCS § 5/3-3-13(c) (2007). Thus, whether a governor decides to pardon or deny

clemency is entirely discretionary, regardless of the recommendation of the PRB.

The plaintiffs assert that they do not seek a necessarily favorable clemency decision, but seek rather to compel the Governor to make timely decisions on their outstanding clemency petitions. Specifically, plaintiffs cite § 5/3-3-13(d) which states: "The Governor *shall decide* each application and communicate his decision to the Board which shall notify the petitioner." 730 ILCS § 5/3-3-13(d) (emphasis added). The plaintiffs argue that the mandatory language of the statute (characterized by the use of the imperative verb "shall") creates a liberty interest in a clemency decision being made (either positive or negative) within a reasonable period of time subsequent to the PRB's recommendation. *See Kraushaar v. Flannigan,* 45 F.3d 1040, 1048 (7th Cir. 1993) (state statutes with a "mandatory character" establish a liberty interest). According to the plaintiffs, a liberty interest thus established is entitled to the procedural protections of the Due Process clause of the Fourteenth Amendment to the United States Constitution. *Vitek v. Jones,* 445 U.S. 480, 488 (1980) (state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment).

Such state-created liberties are properly analyzed by this court under a theory of procedural (rather than substantive) due process. *Kraushaar,* 45 F.3d at 1047. The question before the court, then, is whether § 5/3-3-13 creates a liberty interest that

would trigger a constitutional violation if fair procedures were not followed when depriving a plaintiff of that interest. *Id.* at 1048. As plaintiffs correctly point out, the court should find a liberty interest in a state's statute or regulation only if it employs "language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will' or 'must' be employed." *Hewitt v. Helms,* 459 U.S. 460, 471 (1983). The analysis, however, does not stop at that point: the statute in question must also "contain substantive standards or criteria for decisionmaking as opposed to vague standards that leave the decisionmaker with unfettered discretion."[1] *Rickard v. Sternes,* 44 Fed. Appx. 738, 740 (7th Cir. 2002); *Kraushaar*, 45 F.3d at 1048; *Miller v. Henman,* 804 F.2d 421, 427 (7th Cir. 1986). A state therefore creates a protected liberty interest only by placing substantive limitations on official discretion. *Olim v. Wakinekona,* 461 U.S. 238, 249 (1983).

In this case, the Illinois legislature has placed no restrictions on the Governor's discretion whether to grant or deny an individual's application for clemency. But it *has* placed, in § 5/3-3-13, an unambiguous restriction on the Governor's putative discretion whether to make *any* decision at all. The mandatory

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[1] Or, in other words: "[A] liberty interest is created only where the state regulation in question contains 'specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow. . . .' *Ky. Dept. of Corrs. v. Thompson*, 490 U.S. 454, 463 (1989).

language of § 5/3-3-13 does not leave the Governor with "vague standards that leave the decisionmaker with unfettered discretion" concerning *when* a clemency decision is to me made (or, indeed, if one is to be made at all). On the contrary, the statutory language is unequivocal: the Governor "*shall decide* each application and communicate his decision to the Board which shall notify the petitioner." 730 ILCS § 5/3-3-13(d). The court finds, therefore, that the Illinois legislature has thus created a procedural due process liberty interest in the procedures governing when and how a clemency position is made once the PRB has submitted its report to the Governor.

The Seventh Circuit has "rejected the notion that any and all state . . . rules and regulations containing such [mandatory] language automatically create 'legitimate claims of entitlement' triggering the procedural protections of the Due Process Clause." *Colon v. Schneider,* 899 F.2d 660, 667 (7th Cir. 1990); *see also Kraushaar,* 45 F.3d at 1048-49; *Miller,* 804 F.2d at 424 (some statutes and regulations create only guidelines that direct the manner in which state personnel exercise their discretion to perform certain activities). However, the statutory language of § 5/3-3-13 does not create guidelines by which the Governor's ultimate discretionary clemency decision itself is regulated. The discretionary power to grant or deny a clemency petition remains untouched by the statutory language. Nevertheless, the statute explicitly and unequivocally requires that *some* decision *shall*

be made, and it is therein that the state has created a liberty interest protected by the Due Process clause.

Moreover, although § 5/3-3-13 does not specify a time period in which the Governor must make a decision on clemency petitions following submission of the PRB's recommendation, the necessary implication of the statute's imperative language is that the decision be made within a reasonable period of time. *See Agbemaple v. INS,* No. 97 C 8547, 1998 WL 292441, at *2 (N.D. Ill. May 18, 1998) (statutory language including "shall" or other mandatory language implies a decision within a reasonable time). Otherwise, the Governor could delay making decisions indefinitely. Such indefinite delays were evidently not contemplated by the drafters of the statute, who also created a protectable liberty interest of petitioners to reapply for clemency, after a year's passage, following a denial of their petition. 730 ILCS § 5/3-3-13(a-5). To permit the Governor to delay clemency decisions indefinitely effectively also infringes this protected right and effectively thwarts the legislature's constitutional right to regulate the process by which pardons are regulated by law. Ill. Const. Art V, § 12

Section 5/3-3-13 creates specific guidelines and criteria that direct the manner in which the Governor exercises his discretion to grant clemency petitions. The Governor's power to grant clemency under the Illinois Constitution remains entirely discretionary and explicitly unfettered by the statute. However, the unequivocal and mandatory language of § 5/3-3-13

requires that the Governor make *some* decision within a reasonable period of time. Under § 5/3-3-13 the Illinois legislature has created a statutory, specific procedure (and thus a colorable right) to petition for clemency; by necessary implication, therefore, there exists a similar right to a decision on that petition.

Plaintiffs have alleged that the Governor has been dilatory or derelict in his duty under the statutory requirements of § 5/3-3-13 to make decisions on clemency petitions within a reasonable time. Whether or not that is the case, of course, cannot be determined without evidence. The court finds, however, that plaintiffs' allegations plausibly suggest that they have a right to relief, and have raised that possibility above a "speculative level" as required by *Twombly*, 127 S. Ct. at 1959.

The Governor's arguement that the plaintiffs seek to impede the Governor's constitutional discretion to grant or deny clemency is without merit. It finds that plaintiffs have alleged claims sufficient to establish a protectable liberty interest in having a decision made concerning their clemency petitions within a reasonable period of time subsequent to the PRB's recommendation. Plaintiffs have therefore adequately stated a claim upon which relief can be granted. The Governor's motion to dismiss this portion of plaintiffs' amended complaint is denied.

C. Plaintiffs' Claim of Retaliation

The eight plaintiffs whose clemency petitions have been denied also seek injunctive relief, alleging that their petitions for clemency were rejected in retaliation for filing this suit. The plaintiffs seek to compel the Governor to disclose the reasons for, and processes employed in, the decision to deny their petitions for clemency.

The United States Supreme Court has held that, "pardon and commutation hearings have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Dumschat,* 452 U.S. at 464. The Supreme Court has since wrestled with the question of whether an individual has *any* protectable liberty interest in the clemency process. Writing for a plurality in *Ohio Adult Parole Authority v. Woodard,* Chief Justice Rehnquist stated that petitions for commutation of sentence or clemency are simply "unilateral hopes." 523 U.S. 272, 280 (1998) (citing *Dumschat,* 452 U.S. at 465). The Chief Justice went on to remark that finding a due process interest would be "inconsistent with the heart of executive clemency, which is to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations. *Woodard,* 523 U.S. at 280-81. He concluded by noting that "the executive's clemency authority would cease to be a matter of grace committed to the executive authority

if it were constrained by . . . [due process] procedural requirements. . . ." *Id.* at 285.

Justice O'Connor, concurring in the judgment, disagreed, stating that "some *minimal* procedural safeguards apply to clemency proceedings." *Id.* at 289 (O'Connor, J., concurring) (italics in original). Judicial intervention might be warranted, wrote Justice O'Connor, "in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* Likewise, Justice Stevens, suggested that "minimal, perhaps even barely perceptible, safeguards" are required in clemency proceedings. *Id.* at 290 (Stevens, J., concurring in part and dissenting in part) (quoting *Woodard v. Ohio Adult Parole Auth.*, 107 F.3d 1178, 1187 (6th Cir. 1997)). Justice Stevens thus disagreed with the Chief Justice's conclusion that a clemency proceeding could never violate the Due Process Clause, arguing that procedures "infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence" would be constitutionally unacceptable. *Id.* at 290-91. "[N]o one," argued Justice Stevens, "would contend that a Governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency." *Id.* at 292.

Jurists in lower courts have since cited *Woodard* to promote their competing views of due process requirements in clemency proceedings. *Compare, e.g.*,

Smith v. Ashcroft, 295 F.3d 425, 429 (4th Cir. 2002) (discretionary relief does not create a liberty interest protected by the Due Process Clause), *and McCowin v. Kent,* 32 Fed. Appx. 126, 126 (5th Cir. 2002) ("[Plaintiff does not have a liberty interest in the clemency process."), *with Young v. Haynes,* 218 F.3d 850, 853 (8th Cir. 2000) (Due process is violated if the state actively interferes with a prisoner's access to the very system that it has itself established for considering clemency petitions), *and Spivey v. State Bd. of Pardons and Paroles,* 279 F.3d 1301, 1304 (11th Cir. 2002) (Barkett, J., dissenting) (citing *Woodard* in support of the proposition that "prisoners are entitled to a modicum of due process in a clemency proceeding"). However, the courts have not been explicit in addressing precisely how the standard of "minimal, perhaps even barely perceptible, safeguards" is to be analyzed or applied.

Assuming, *arguendo,* that due process requirements establish some minimal procedural safeguards in clemency proceedings, plaintiffs have nevertheless failed to allege sufficient facts to support their claim that their clemency petitions were denied by the Governor in retaliation for filing this suit.

Plaintiffs hang their argument that they were victims of retaliation upon two alleged facts: (1) that eight of the nine petitions that were decided after this suit was filed were refused clemency; and (2) alleged official hostility in the Governor's response to a letter sent by the Cabrini Green Legal Aid Clinic ("CGLAC"), which prepared the clemency petitions.

Amended Compl. ¶¶ 48, 49. The alleged hostility is encapsulated in a single sentence in the Governor's response to CGLAC's letter, stating: "[Y]our insinuation that the Governor's Office has not acted expeditiously enough in the clemency arena is not well received." Mem. in Support of Def's Rule 12(b)(6) to Dismiss Pl.'s Amended Compl. Ex. A. Given the higher threshold established by the minimal due process safeguards, these alleged facts alone are insufficient to sustain the plaintiffs' claim.

The suit may well have provoked the Governor to attempt to resolve some of the plaintiffs' petitions. However, the quoted language hardly demonstrates a plausible claim that the suit infected the merits of his decision. Permitting conclusory allegations such as those advanced by plaintiffs to justify federal judicial review of the Governor's discretionary and constitutionally unfettered pardoning power impermissibly flies in the face of the Supreme Court's well-established holding that "pardon and commutation hearings have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review." *Dumschat,* 452 U.S. at 464. Were this court to permit judicial review of the Governor's acts based solely upon the allegations presented by plaintiffs, the threshold for judicial review of the Governor's unfettered discretion in granting clemency would drop precipitously, and judicial review of the reasoning behind clemency petitions would likely become impermissibly routine,

and perhaps even the norm. The court declines to go in that direction.

Because plaintiffs have not alleged facts establishing a plausible causal nexus between the filing of this suit and denial of their clemency petitions by the Governor, their claim must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).[2]

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[2] The Governor also claims that plaintiffs' suit is barred by the Eleventh Amendment's prohibition of federal suits by citizens against their own state. Since other arguments are dispositive of this motion to dismiss, the court merely notes in passing that it is well-established that where a challenged action by a state official is found to be unconstitutional, a federal court may grant prospective injunctive relief against that official in order to prevent a continuing violation of federal law. The Governor's argument is therefore without merit. *See, e.g., P. R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993); *Parents for Quality Educ. With Integration, Inc. v. State of Ind.*, 977 F.2d 1207, 1209-10 (7th Cir. 1992).

II. Conclusion

For the reasons set forth above, the Governor's motion to dismiss plaintiffs' amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) is denied in part and granted in part.

ENTER:

/s/
JOAN B. GOTTSCHALL
United States District Judge

DATED: March 11, 2008

Illinois Constitution – Article V

SECTION 12. GOVERNOR – PARDONS

The Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law.

(Source: Illinois Constitution.)

Illinois General Assembly – Illinois Compiled Statutes

(730 ILCS 5/3-3-13) (from Ch. 38, par. 1003-3-13)

Sec. 3-3-13. Procedure for Executive Clemency.

(a) Petitions seeking pardon, commutation, or reprieve shall be addressed to the Governor and filed with the Prisoner Review Board. The petition shall be in writing and signed by the person under conviction or by a person on his behalf. It shall contain a brief history of the case, the reasons for seeking executive clemency, and other relevant information the Board may require.

(a-5) After a petition has been denied by the Governor, the Board may not accept a repeat petition for executive clemency for the same person until one full year has elapsed from the date of the denial. The Chairman of the Board may waive the one-year requirement if the petitioner offers in writing new information that was unavailable to the petitioner at the time of the filing of the prior petition and which the Chairman determines to be significant. The Chairman also may waive the one-year waiting period if the petitioner can show that a change in circumstances of a compelling humanitarian nature has arisen since the denial of the prior petition.

(b) Notice of the proposed application shall be given by the Board to the committing court and the state's attorney of the county where the conviction was had.

(c) The Board shall, if requested and upon due notice, give a hearing to each application, allowing representation by counsel, if desired, after which it shall confidentially advise the Governor by a written report of its recommendations which shall be determined by majority vote. The Board shall meet to consider such petitions no less than 4 times each year.

Application for executive clemency under this Section may not be commenced on behalf of a person who has been sentenced to death without the written consent of the defendant, unless the defendant, because of a mental or physical condition, is incapable of asserting his or her own claim.

(d) The Governor shall decide each application and communicate his decision to the Board which shall notify the petitioner.

In the event a petitioner who has been convicted of a Class X felony is granted a release, after the Governor has communicated such decision to the Board, the Board shall give written notice to the Sheriff of the county from which the offender was sentenced if such sheriff has requested that such notice be given on a continuing basis. In cases where arrest of the offender or the commission of the offense took place in any municipality with a population of more than 10,000 persons, the Board shall also give written notice to the proper law enforcement agency for said municipality which has requested notice on a continuing basis.

(e) Nothing in this Section shall be construed to limit the power of the Governor under the constitution to grant a reprieve, commutation of sentence, or pardon.

(Source: P.A. 89-112, eff. 7-7-95; 89-684, eff. 6-1-97.)

Joint Committee on Administrative Rules

ADMINISTRATIVE CODE

TITLE 20: CORRECTIONS, CRIMINAL JUSTICE, AND LAW ENFORCEMENT
CHAPTER IV: PRISONER REVIEW BOARD
PART 1610 PRISONER REVIEW BOARD
SECTION 1610.180 RULES GOVERNING PETITIONS FOR EXECUTIVE CLEMENCY (PARDON OR COMMUTATION OF SENTENCE)

Section 1610.180 Rules Governing Petitions for Executive Clemency (Pardon or Commutation of Sentence)

a) All applications for pardons, reprieves and commutations of sentence or adjudication shall be made by written petition, addressed to the Governor and filed in the office of the Prisoner Review Board at Springfield. The original and four copies of the petition must be filed at least thirty (30) days prior to any scheduled meeting of the Board for the purpose of hearing petitions for executive clemency. The petition shall conform to the following requirements:

1) The petition shall contain a brief history of the case, a brief biography of the petitioner, setting forth his full and correct name, any aliases he may have used during his lifetime, his age, place of birth, the different places where he has resided, the years of residence in each place, the occupations pursued in each

locality, and the specific reasons why a pardon or commutation of sentence should be granted.

2) It shall be signed by the applicant or other person in his behalf.

3) If signed by another person, the full address of such person shall be given, and his relation to the applicant stated.

b) Copies of the petition shall be furnished to the sentencing judge or, if for any reason this is not possible, to the chief judge of the Circuit in which sentence was imposed, and the Prosecuting State's Attorney, if available, and also to the present State's Attorney of the county from which the petitioner was committed in each case. Proof of such service may be made by a receipt of such official, or affidavit that it was posted, or a receipt of the United States Post Office if sent by registered or certified mail. Such proof of service shall accompany the petition.

c) Publication of intent to petition for executive clemency shall be made in a newspaper of common circulation in the county of commitment on at least two occasions no less than two weeks apart. Said notice shall contain the name of the petitioner, the offense for which he was convicted, the date of sentencing and the sentence imposed. Said notice shall invite any interested party to communicate their views to the offices of the Prisoner Review Board prior to the scheduled hearing date.

d) Where circumstances warrant or the exigencies of the case suggest, the Board may waive the requirement of publication of intent to file for executive clemency.

e) For each meeting of the Board, a docket shall be prepared listing all petitions filed thirty (30) days or more before the date of the meeting which have not been previously considered and which petitions comply with the applicable statutes of Illinois and these rules. Counsel and those who wish to be heard in favor of or in opposition to the respective petitions on the call of the docket, must register in person at the meeting of the Board.

f) The Board or a designated panel thereof will hear counsel or any other persons who appear in support of or in opposition to the petition at the scheduled public hearing. The Board will also consider petitions on the docket on which there are no appearances and may elect to hear petitioners who are in confinement.

g) No requirement herein shall preclude the Chairman or the Governor from calling a special session of the Board for the purpose of giving a hearing and consideration to any petition deemed to be of an emergency nature. All usual requirements shall be met insofar as is practical.

h) The Board will determine by majority vote in conference what its recommendation is on

each petition and shall advise the Governor by a written report without publicity.

(20 ILCS 2630/5) (from Ch. 38, par. 206-5)

Sec. 5. Arrest reports; expungement.

(a) All policing bodies of this State shall furnish to the Department, daily, in the form and detail the Department requires, fingerprints and descriptions of all persons who are arrested on charges of violating any penal statute of this State for offenses that are classified as felonies and Class A or B misdemeanors and of all minors of the age of 10 and over who have been arrested for an offense which would be a felony if committed by an adult, and may forward such fingerprints and descriptions for minors arrested for Class A or B misdemeanors. Moving or nonmoving traffic violations under the Illinois Vehicle Code shall not be reported except for violations of Chapter 4, Section 11-204.1, or Section 11-501 of that Code. In addition, conservation offenses, as defined in the Supreme Court Rule 501(c), that are classified as Class B misdemeanors shall not be reported.

Whenever an adult or minor prosecuted as an adult, not having previously been convicted of any criminal offense or municipal ordinance violation, charged with a violation of a municipal ordinance or a felony or misdemeanor, is acquitted or released without being convicted, whether the acquittal or release occurred before, on, or after the effective date of this amendatory Act of 1991, the Chief Judge of the circuit wherein the charge was brought, any judge of that circuit designated by the Chief Judge, or in counties of less than 3,000,000 inhabitants, the presiding trial

judge at the defendant's trial may upon verified petition of the defendant order the record of arrest expunged from the official records of the arresting authority and the Department and order that the records of the clerk of the circuit court be sealed until further order of the court upon good cause shown and the name of the defendant obliterated on the official index required to be kept by the circuit court clerk under Section 16 of the Clerks of Courts Act, but the order shall not affect any index issued by the circuit court clerk before the entry of the order. The Department may charge the petitioner a fee equivalent to the cost of processing any order to expunge or seal the records, and the fee shall be deposited into the State Police Services Fund. The records of those arrests, however, that result in a disposition of supervision for any offense shall not be expunged from the records of the arresting authority or the Department nor impounded by the court until 2 years after discharge and dismissal of supervision. Those records that result from a supervision for a violation of Section 3-707, 3-708, 3-710, 5-401.3, or 11-503 of the Illinois Vehicle Code or a similar provision of a local ordinance, or for a violation of Section 12-3.2, 12-15 or 16A-3 of the Criminal Code of 1961, or probation under Section 10 of the Cannabis Control Act, Section 410 of the Illinois Controlled Substances Act, Section 70 of the Methamphetamine Control and Community Protection Act, Section 12-4.3(b)(1) and (2) of the Criminal Code of 1961 (as those provisions existed before their deletion by Public Act 89-313), Section 10-102 of the Illinois Alcoholism and Other Drug

Dependency Act when the judgment of conviction has been vacated, Section 40-10 of the Alcoholism and Other Drug Abuse and Dependency Act when the judgment of conviction has been vacated, or Section 10 of the Steroid Control Act shall not be expunged from the records of the arresting authority nor impounded by the court until 5 years after termination of probation or supervision. Those records that result from a supervision for a violation of Section 11-501 of the Illinois Vehicle Code or a similar provision of a local ordinance, shall not be expunged. All records set out above may be ordered by the court to be expunged from the records of the arresting authority and impounded by the court after 5 years, but shall not be expunged by the Department, but shall, on court order be sealed by the Department and may be disseminated by the Department only as required by law or to the arresting authority, the State's Attorney, and the court upon a later arrest for the same or a similar offense or for the purpose of sentencing for any subsequent felony. Upon conviction for any offense, the Department of Corrections shall have access to all sealed records of the Department pertaining to that individual.

(a-5) Those records maintained by the Department for persons arrested prior to their 17th birthday shall be expunged as provided in Section 5-915 of the Juvenile Court Act of 1987.

(b) Whenever a person has been convicted of a crime or of the violation of a municipal ordinance, in the name of a person whose identity he has stolen or

otherwise come into possession of, the aggrieved person from whom the identity was stolen or otherwise obtained without authorization, upon learning of the person having been arrested using his identity, may, upon verified petition to the chief judge of the circuit wherein the arrest was made, have a court order entered nunc pro tunc by the chief judge to correct the arrest record, conviction record, if any, and all official records of the arresting authority, the Department, other criminal justice agencies, the prosecutor, and the trial court concerning such arrest, if any, by removing his name from all such records in connection with the arrest and conviction, if any, and by inserting in the records the name of the offender, if known or ascertainable, in lieu of the aggrieved's name. The records of the clerk of the circuit court clerk shall be sealed until further order of the court upon good cause shown and the name of the aggrieved person obliterated on the official index required to be kept by the circuit court clerk under Section 16 of the Clerks of Courts Act, but the order shall not affect any index issued by the circuit court clerk before the entry of the order. Nothing in this Section shall limit the Department of State Police or other criminal justice agencies or prosecutors from listing under an offender's name the false names he or she has used. For purposes of this Section, convictions for moving and nonmoving traffic violations other than convictions for violations of Chapter 4, Section 11-204.1 or Section 11-501 of the Illinois Vehicle Code shall not be a bar to expunging the

record of arrest and court records for violation of a misdemeanor or municipal ordinance.

(c) Whenever a person who has been convicted of an offense is granted a pardon by the Governor which specifically authorizes expungement, he may, upon verified petition to the chief judge of the circuit where the person had been convicted, any judge of the circuit designated by the Chief Judge, or in counties of less than 3,000,000 inhabitants, the presiding trial judge at the defendant's trial, may have a court order entered expunging the record of arrest from the official records of the arresting authority and order that the records of the clerk of the circuit court and the Department be sealed until further order of the court upon good cause shown or as otherwise provided herein, and the name of the defendant obliterated from the official index requested to be kept by the circuit court clerk under Section 16 of the Clerks of Courts Act in connection with the arrest and conviction for the offense for which he had been pardoned but the order shall not affect any index issued by the circuit court clerk before the entry of the order. All records sealed by the Department may be disseminated by the Department only as required by law or to the arresting authority, the State's Attorney, and the court upon a later arrest for the same or similar offense or for the purpose of sentencing for any subsequent felony. Upon conviction for any subsequent offense, the Department of Corrections shall have access to all sealed records of the Department pertaining to that individual. Upon entry of the order of expungement, the clerk of the circuit

court shall promptly mail a copy of the order to the person who was pardoned.

(c-5) Whenever a person has been convicted of criminal sexual assault, aggravated criminal sexual assault, predatory criminal sexual assault of a child, criminal sexual abuse, or aggravated criminal sexual abuse, the victim of that offense may request that the State's Attorney of the county in which the conviction occurred file a verified petition with the presiding trial judge at the defendant's trial to have a court order entered to seal the records of the clerk of the circuit court in connection with the proceedings of the trial court concerning that offense. However, the records of the arresting authority and the Department of State Police concerning the offense shall not be sealed. The court, upon good cause shown, shall make the records of the clerk of the circuit court in connection with the proceedings of the trial court concerning the offense available for public inspection.

(c-6) If a conviction has been set aside on direct review or on collateral attack and the court determines by clear and convincing evidence that the defendant was factually innocent of the charge, the court shall enter an expungement order as provided in subsection (b) of Section 5-5-4 of the Unified Code of Corrections.

(d) Notice of the petition for subsections (a), (b), and (c) shall be served by the clerk upon the State's Attorney or prosecutor charged with the duty of prosecuting the offense, the Department of State

Police, the arresting agency and the chief legal officer of the unit of local government affecting the arrest. Unless the State's Attorney or prosecutor, the Department of State Police, the arresting agency or such chief legal officer objects to the petition within 30 days from the date of the notice, the court shall enter an order granting or denying the petition. The clerk of the court shall promptly mail a copy of the order to the person, the arresting agency, the prosecutor, the Department of State Police and such other criminal justice agencies as may be ordered by the judge.

(e) Nothing herein shall prevent the Department of State Police from maintaining all records of any person who is admitted to probation upon terms and conditions and who fulfills those terms and conditions pursuant to Section 10 of the Cannabis Control Act, Section 410 of the Illinois Controlled Substances Act, Section 70 of the Methamphetamine Control and Community Protection Act, Section 12-4.3 of the Criminal Code of 1961, Section 10-102 of the Illinois Alcoholism and Other Drug Dependency Act, Section 40-10 of the Alcoholism and Other Drug Abuse and Dependency Act, or Section 10 of the Steroid Control Act.

(f) No court order issued under the expungement provisions of this Section shall become final for purposes of appeal until 30 days after notice is received by the Department. Any court order contrary to the provisions of this Section is void.

(g) Except as otherwise provided in subsection (c-5) of this Section, the court shall not order the sealing or expungement of the arrest records and records of the circuit court clerk of any person granted supervision for or convicted of any sexual offense committed against a minor under 18 years of age. For the purposes of this Section, "sexual offense committed against a minor" includes but is not limited to the offenses of indecent solicitation of a child or criminal sexual abuse when the victim of such offense is under 18 years of age.

(h)(1) Applicability. Notwithstanding any other provision of this Act to the contrary and cumulative with any rights to expungement of criminal records, this subsection authorizes the sealing of criminal records of adults and of minors prosecuted as adults.

(2) Sealable offenses. The following offenses may be sealed:

(A) All municipal ordinance violations and misdemeanors, with the exception of the following:

(i) violations of Section 11-501 of the Illinois Vehicle Code or a similar provision of a local ordinance;

(ii) violations of Article 11 of the Criminal Code of 1961 or a similar provision of a local ordinance, except Section 11-14 of the Criminal Code of 1961 as provided in clause B(i) of this subsection (h);

(iii) violations of Section 12-15, 12-30, or 26-5 of the Criminal Code of 1961 or a similar provision of a local ordinance;

(iv) violations that are a crime of violence as defined in Section 2 of the Crime Victims Compensation Act or a similar provision of a local ordinance;

(v) Class A misdemeanor violations of the Humane Care for Animals Act; and

(vi) any offense or attempted offense that would subject a person to registration under the Sex Offender Registration Act.

(B) Misdemeanor and Class 4 felony violations of:

(i) Section 11-14 of the Criminal Code of 1961;

(ii) Section 4 of the Cannabis Control Act;

(iii) Section 402 of the Illinois Controlled Substances Act; and

(iv) Section 60 of the Methamphetamine Control and Community Protection Act.

However, for purposes of this subsection (h), a sentence of first offender probation under Section 10 of the Cannabis Control Act, Section 410 of the Illinois Controlled Substances Act, or Section 70 of the Methamphetamine Control and Community Protection Act shall be treated as a Class 4 felony conviction.

(3) Requirements for sealing. Records identified as sealable under clause (h)(2) may be sealed when the individual was:

(A) Acquitted of the offense or offenses or released without being convicted.

(B) Convicted of the offense or offenses and the conviction or convictions were reversed.

(C) Placed on misdemeanor supervision for an offense or offenses; and

(i) at least 3 years have elapsed since the completion of the term of supervision, or terms of supervision, if more than one term has been ordered; and

(ii) the individual has not been convicted of a felony or misdemeanor or placed on supervision for a misdemeanor or felony during the period specified in clause (i).

(D) Convicted of an offense or offenses; and

(i) at least 4 years have elapsed since the last such conviction or term of any sentence, probation, parole, or supervision, if any, whichever is last in time; and

(ii) the individual has not been convicted of a felony or misdemeanor or placed on supervision for a misdemeanor or felony during the period specified in clause (i).

(4) Requirements for sealing of records when more than one charge and disposition have been filed. When multiple offenses are petitioned to be sealed

under this subsection (h), the requirements of the relevant provisions of clauses (h)(3)(A) through (D) each apply. In instances in which more than one waiting period is applicable under clauses (h)(C)(i) and (ii) and (h)(D)(i) and (ii), the longer applicable period applies, and the requirements of clause (h)(3) shall be considered met when the petition is filed after the passage of the longer applicable waiting period. That period commences on the date of the completion of the last sentence or the end of supervision, probation, or parole, whichever is last in time.

(5) Subsequent convictions. A person may not have subsequent felony conviction records sealed as provided in this subsection (h) if he or she is convicted of any felony offense after the date of the sealing of prior felony records as provided in this subsection (h).

(6) Notice of eligibility for sealing. Upon acquittal, release without conviction, or being placed on supervision for a sealable offense, or upon conviction of a sealable offense, the person shall be informed by the court of the right to have the records sealed and the procedures for the sealing of the records.

(7) Procedure. Upon becoming eligible for the sealing of records under this subsection (h), the person who seeks the sealing of his or her records shall file a petition requesting the sealing of records with the clerk of the court where the charge or charges were brought. The records may be sealed by the Chief Judge of the circuit wherein the charge was

brought, any judge of that circuit designated by the Chief Judge, or in counties of less than 3,000,000 inhabitants, the presiding trial judge at the defendant's trial, if any. If charges were brought in multiple jurisdictions, a petition must be filed in each such jurisdiction. The petitioner shall pay the applicable fee, if not waived.

(A) Contents of petition. The petition shall contain the petitioner's name, date of birth, current address, each charge, each case number, the date of each charge, the identity of the arresting authority, and such other information as the court may require. During the pendency of the proceeding, the petitioner shall promptly notify the clerk of the court of any change of address.

(B) Drug test. A person filing a petition to have his or her records sealed for a Class 4 felony violation of Section 4 of the Cannabis Control Act or for a Class 4 felony violation of Section 402 of the Illinois Controlled Substances Act must attach to the petition proof that the petitioner has passed a test taken within the previous 30 days before the filing of the petition showing the absence within his or her body of all illegal substances in violation of either the Illinois Controlled Substances Act or the Cannabis Control Act.

(C) Service of petition. The clerk shall promptly serve a copy of the petition on the State's Attorney or prosecutor charged with the duty of prosecuting the offense, the Department of State Police, the arresting

agency and the chief legal officer of the unit of local government effecting the arrest.

(D) Entry of order. Unless the State's Attorney or prosecutor, the Department of State Police, the arresting agency or such chief legal officer objects to sealing of the records within 90 days of notice the court shall enter an order sealing the defendant's records.

(E) Hearing upon objection. If an objection is filed, the court shall set a date for a hearing and notify the petitioner and the parties on whom the petition had been served, and shall hear evidence on whether the sealing of the records should or should not be granted, and shall make a determination on whether to issue an order to seal the records based on the evidence presented at the hearing.

(F) Service of order. After entering the order to seal records, the court must provide copies of the order to the Department, in a form and manner prescribed by the Department, to the petitioner, to the State's Attorney or prosecutor charged with the duty of prosecuting the offense, to the arresting agency, to the chief legal officer of the unit of local government effecting the arrest, and to such other criminal justice agencies as may be ordered by the court.

(8) Fees. Notwithstanding any provision of the Clerk of the Courts Act to the contrary, and subject to the approval of the county board, the clerk may charge a fee equivalent to the cost associated with the

sealing of records by the clerk and the Department of State Police. The clerk shall forward the Department of State Police portion of the fee to the Department and it shall be deposited into the State Police Services Fund.

(i) Subject to available funding, the Illinois Department of Corrections shall conduct a study of the impact of sealing, especially on employment and recidivism rates, utilizing a random sample of those who apply for the sealing of their criminal records under Public Act 93-211, in accordance to rules adopted by the Department. At the request of the Illinois Department of Corrections, records of the Illinois Department of Employment Security shall be utilized as appropriate to assist in the study. The study shall not disclose any data in a manner that would allow the identification of any particular individual or employing unit. The study shall be made available to the General Assembly no later than September 1, 2006.

(j) Notwithstanding any provision of the Clerks of Courts Act to the contrary, the clerk may charge a fee equivalent to the cost associated with the sealing or expungement of records by the clerk. From the total filing fee collected for the Petition to seal or expunge, the clerk shall deposit $10 into the Circuit Court Clerk Operation and Administrative Fund, to be used to offset the costs incurred by the Circuit Court Clerk in performing the additional duties required to serve the Petition to Seal or Expunge on all parties. The clerk shall also charge a filing fee

equivalent to the cost of sealing or expunging the record by the Department of State Police. The clerk shall collect and forward the Department of State Police portion of the fee to the Department and it shall be deposited in the State Police Services Fund.

(Source: P.A. 94-556, eff. 9-11-05; 95-955, eff. 1-1-09.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Stephanie Bowens, James Corbin, Larry Green, Ernest Jones, Kevin Little, Robert Lozano, Albert Pulido, Denise Smith, Charles Thomas, Percy Mack, Eric Love, and Vonda Wallace,	)	Case No. 06 C 4915
Plaintiffs,	)	Judge Gottschall
v.	)	
Governor Rod Blagojevich,	)	
Defendant.	)	

AMENDED COMPLAINT AT LAW

(Filed Apr. 2, 2007)

Plaintiffs, including new plaintiffs Percy Mack, Eric Love, and Vonda Wallace, for their complaint against defendant Governor Rod Blagojevich, by their attorneys, state as follows:

Statement of the Case

1. This is a civil action for an injunction requiring defendant Governor Rod Blagojevich to act upon the non-binding recommendations of the Illinois Prisoner Review Board ("PRB") concerning plaintiffs' and others' petitions for clemency within a reasonable period of time, pursuant to 730 Ill. Comp. Stat. 5/3-3-13 (and the Illinois Constitution). The Governor's

failure to so act deprived, and continues to deprive, plaintiffs, under color of law, of their rights of due process as guaranteed by the United States Constitution, the laws of the United States, and the laws of Illinois. This action also seeks an injunction requiring Governor Blagojevich to disclose the reasons for and processes used in denying the petitions of eight plaintiffs after they filed this lawsuit.

2. As set forth more fully herein, the purpose of Illinois' clemency review procedure is to provide a redemptive opportunity to individuals who have significantly and positively transformed their lives. Illinois' clemency procedure can enable a rehabilitated convicted felon, in the Governor's discretion, to become a more fully engaged and productive citizen, to the benefit of society and the interests of the State of Illinois.

3. Among other things, Illinois' clemency review procedures can also help petitioners escape the continually punitive nature of a record of a prior felony conviction that impairs their ability to obtain good jobs. In the case of plaintiffs, the felonies for which they were convicted occurred many years, in some cases decades, ago.

4. The Governor has not decided a large number of clemency petitions, including those of new plaintiffs Love, Mack, and Wallace, which have been acted upon by the PRB. To fulfill the purposes of the statute (and Constitution), satisfy the requirements of due process, benefit petitioners and their families and

strengthen the social fabric of the State of Illinois, the Governor should be required to act upon petitions for clemency that have been reviewed by the PRB within a reasonable period of time.

Jurisdiction and Venue

5. The Court has jurisdiction of this action under 42 U.S.C. § 1983 and under 28 U.S.C. 1343.

Illinois Clemency Provision

6. Section 12 of article V of the Illinois Constitution provides that the "Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law."

7. The process through which clemency is regulated is set forth in Illinois statute 730 Ill. Comp. Stat. 5/3-3-13. Section 5/3-3-2(a)(6) authorizes the PRB, through a panel of at least three members, to serve in a quasi-judicial capacity, to hear all requests for pardon, reprieve or commutation and to make recommendations to the Governor based on the merits of the individual's request. The PRB's recommendation is not binding on the Governor. Appropriations for the PRB are established in the current fiscal year by Article 69 of the Public Act 94-0798. The PRB's budget exceeds $1 million for administrative, notification and contingent expense purposes.

8. The PRB examines the petitioner's circumstances through written application, the gathering of evidence and the taking of testimony. The PRB then deliberates and makes a recommendation based on the weight of the evidence. The PRB decides by majority vote on the petitioner's application and communicates, by written report, its decision directly and confidentially to the Governor.

9. The backlog of pending clemency cases is substantial. Though the Governor has acted in certain cases, on information and belief, as of July 27, 2006, there were approximately 1,947 pending clemency petitions awaiting a final decision by the Governor, including those of certain plaintiffs.

10. The Illinois Prisoner Review Board reaches a decision on each petition quarterly, following each petitioner's hearing. In the case of each plaintiff's petition, the Illinois PRB has made and communicated a recommendation to the Governor.

11. On, February 23, 2007, after this lawsuit was first filed, the Governor granted plaintiff Kevin Little's petition. However, he denied the petitions of plaintiffs Stephanie Bowens, James Corbin, Larry Green, Ernest Jones, Robert Lozano, Albert Pulido, Denise Smith, and Charles Thomas. He has not yet decided the petitions of new plaintiffs Percy Mack, Eric Love, and Vonda Wallace.

Parties

12. All plaintiffs are citizens and residents of the State of Illinois and citizens of the United States, residing in Chicago, Illinois except for plaintiff James Corbin, who resides in Markham, Illinois.

13. Defendant Rod Blagojevich has been, at all times material to this Complaint, the elected Governor of the state of Illinois, except in the case of plaintiff Earnest Jones, who filed his petition in 2002, during the tenure of former Governor George Ryan.

Cabrini Green Legal Aid Clinic

14. All of the plaintiffs' clemency petitions were prepared by Cabrini Green Legal Aid Clinic ("CGLA"), a not-for-profit legal aid clinic serving Chicago's less fortunate citizens. CGLA's intake procedure requires that (i) a prescreening review of each client's Chicago Police Department rap sheet take place, followed by an extensive and detailed interview, that (ii) its clients been convicted of an offense in Cook County or have been released from prison for (in most cases) at least 10 years, that (iii) its clients have no or insignificant intervening arrests, that (iv) its clients have had a significant life change since the conviction and that (v) its clients have specific examples of continuing adverse consequences caused by the conviction. Additionally, each petitioner is asked to present an account of his/her education and employment history, community activity, family history, substance abuse history and a brief statement of fact

regarding the offense(s) for which he/she seeks clemency.

Facts Concerning Bowens

15. Stephanie Bowens filed for clemency according to the appropriate Illinois Prisoner Review Board Guidelines and Illinois statutory procedures for Executive Clemency on August 20, 2003. She participated in a hearing with the Illinois Prisoner Review Board in October 2003. In 1996, at age 24, Bowens pled guilty to possession with intent to deliver cannabis and served two years probation terminating in 1999.

16. Bowens, now a 34 year old wife and mother of four, has completed course work in phlebotomy and hopes to find permanent employment in the field of medical technology. However, due to her conviction of 1996, she has been denied certification to become a phlebotomy technician and has been kept from permanent work at both Northwestern Memorial Hospital and Rush Presbyterian.

Facts Concerning Little

17. Kevin Little filed for clemency according to the appropriate Illinois Prisoner Review Board Guidelines and Illinois statutory procedures for Executive Clemency on October 30, 2003. He participated in a hearing with the Illinois Prisoner Review Board in April 2004. In 1991, at age 19, Little pled guilty to possession of a stolen motor vehicle – a vehicle Little

was neither riding in at the time of arrest nor had seen before. Little was not an acquaintance of the individuals in the stolen vehicle.

18. In the 15 years since his 1991 arrest, Little, now 34, has received a Bachelor's degree from Northeastern Illinois University in economics, as well as certificates in advanced phlebotomy and cardiovascular technology. He is married and has four children. Little volunteers in his community's church and hopes to work in the Chicago Park District or become a probation officer, targeting Chicago's youth and less fortunate for mentoring. However, due to his 1991 conviction, he was rejected from or denied advancement in several positions following a background check.

Facts Concerning Thomas

19. Charles Thomas filed for clemency according to the appropriate Illinois Prisoner Review Board Guidelines and Illinois statutory procedures for Executive Clemency on July 28, 2004. He participated in a hearing with the Illinois Prisoner Review Board in April 2004. Thomas pled guilty to aggravated battery despite not being present at the scene of the altercation. Thomas pled guilty to keep his pregnant wife from serving any jail time.

20. Thomas is now a Deacon in his local church and is training to become a licensed minister. He is a husband of 18 years and a father of five. He is also a counselor at "Safer Foundation," a Chicago area

organization designed to help former inmates within one year of their release. However, Thomas has also twice lost his job due to his 1982 felony conviction, despite consistently performing and being recognized as a good employee.

Facts Concerning Smith

21. Denise Smith filed for clemency according to the appropriate Illinois Prisoner Review Board Guidelines and Illinois statutory procedures on May 3, 2004. She participated in a hearing with the Illinois Prisoner Review Board in October 2004. In 1982, at age 25, Ms. Smith was convicted of aggravated battery against an abusive partner.

22. Smith has been deaf since birth and has been the subject of numerous abusive relationships. She has never received adequate support for her disability. At age 49, now 24 years after her conviction, Smith has freed herself of the abusive relationship giving rise to the conviction. Smith has remained drug free since 1993, when she graduated from a rehabilitation program. She is now married, is a mother of two and a grandmother of four. Smith believes a supportive, non-abusive relationship and sobriety have helped her turn a corner in her life. Yet her criminal record has kept her from progressing professionally. Smith has on several occasions been separated from employment as a result of her 1982 conviction.

Facts Concerning Pulido

23. Albert Pulido filed for clemency according to the appropriate Illinois Prisoner Review Board Guidelines and Illinois statutory procedures for Executive Clemency on July 30, 2004. He participated in a hearing with the Illinois Prisoner Review Board in October 2004. Mr. Pulido pled guilty to possession of a stolen motor vehicle at age 20 in 1987.

24. Nineteen years later, at age 39, Pulido is a single father of two children. He has also abandoned the gang in which he grew up. Pulido participates in his community's little league baseball and chaperoned local school field trips. However, his 1987 conviction has caused him to lose his job in the Chicago Park District despite good work reviews.

Facts Concerning Corbin

25. James Corbin filed for clemency according to the appropriate Illinois Prisoner Review Board Guidelines and Illinois statutory procedures for Executive Clemency on July 28, 2004. He participated in a hearing with the Illinois Prisoner Review Board in October 2004. In 1987, at age 20, Mr. Corbin was convicted of arson as a result of a plea bargain.

26. Corbin is now 39 years of age. At the time of the 1987 alleged crime, Mr. Corbin was at home, asleep in his bed. Mr. Corbin admits to entering the plea bargain in the arson, despite not being at the scene of the crime, to avoid jail time. Corbin has since

completed Bachelor's and Associate's degrees in Business and started his own company despite being paralyzed from the waist down. Mr. Corbin continues to give his time to volunteer work, speaking out against gangs, speaking to battered women as well as participating in SIFE (Students in Free Enterprise), an organization designed to mobilize university students to create economic opportunity for others in the community. 19 years after his conviction Corbin continues to be turned down from employment, despite his credentials, as a result of his conviction.

Facts Concerning Green

27. Larry Green filed for clemency according to the appropriate Illinois Prisoner Review Board Guidelines and Illinois statutory procedures for Executive Clemency on January 25, 2005. He participated in a hearing with the Illinois Prisoner Review Board in April 2005. In 1991, Mr. Green pled guilty to possession of cocaine with intent to distribute.

28. At the time of his guilty plea Mr. Green, a good high school student, was 17 and living at home with his mother and brother – a known drug dealer. Cocaine was found in the Green household and Green was charged with the above crime. 15 years after his conviction, Green supports his sisters, his disabled mother and his two children. Additionally, Green volunteers at Project Hero, a Chicago organization designed to help at-risk youth and aid recently released former inmates. Green, however, has

continued to find his 1991 conviction to be an obstacle to stable and steady employment.

Facts Concerning Jones

29. Earnest Jones filed for clemency according to the appropriate Illinois Prisoner Review Board Guidelines and Illinois statutory procedures for Executive Clemency on October 9, 2002. He participated in a hearing with the Illinois Prisoner Review Board in December 2002. In 1989, he was convicted of theft and official misconduct and received a concurrent sentence of three years in the Cook County Department of Corrections. Jones was released in January 1992.

30. Jones, now a 54 year old husband, father and stepfather, has received associate degrees from Malcolm X College and the American Academy of Art, a bachelor's degree from Columbia College, and has completed course work in electrical maintenance in the hopes of finding permanent employment in the field of electrical contracting. However, due to his conviction in 1989, he has been denied employment and licenses and performance bonds as an electrical contractor.

Facts Concerning Lozano

31. Robert Lozano filed for clemency according to the appropriate Illinois Prisoner Review Board Guidelines and Illinois statutory procedures for

Executive Clemency on September 18, 2003. He participated in a hearing with the Illinois Prisoner Review Board in October 2003. In 1978, at age 18, Lozano pled guilty to robbery and served 210 days in prison and five years probation. In 1985, Lozano pled guilty to manufacture and delivery of a controlled substance and unlawful use of a weapon and served 30 months probation.

32. Lozano, now a 47 year old husband and father of four, wishes to gain employment at the Cook County Sherriff's Department, and has passed both the physical and written examinations to do so. However, due to his convictions of 1978 and 1985, he has been continuously denied a position.

Facts Concerning Mack

33. Percy Mack filed for clemency according to the appropriate Illinois Prisoner Review Board Guidelines and Illinois statutory procedures for Executive Clemency on August 18, 2003. He participated in a hearing with the Illinois Prisoner Review Board in October 2003. In 1971, at age 22, Mack pled guilty to theft after driving a stolen car. He successfully completed his sentence of six months of probation. In 1975, at age 26, Mack pled guilty to contributing to the delinquency of a minor for a relationship with a 16 year-old girl who he believed to be 18.

34. Mack, now 58 years old, is the caregiver for his 16 year-old daughter, whom he has raised as a single parent her entire life. Mack was a boxing trainer for

underprivileged children and coached three future Olympians. He has been volunteering for the American Boxing Federation and Chicago Golden Gloves for over 12 years. Mack hopes to give back to the community by starting a boxing program at a youth detention center to encourage young men to get an education and set goals for their future. Mack used to work for the Chicago Park District as a boxing trainer and he would like the opportunity to work there again. However, due to his 1971 and 1975 convictions, he was not rehired by the Chicago Park District.

Facts Concerning Love

35. Eric Love filed for clemency according to the appropriate Illinois Prisoner Review Board Guidelines and Illinois Statutory procedures for Executive Clemency on November 15, 2004. He participated in a hearing with the Illinois Prisoner Review Board in April 2005. In 1986, at age 28, Love was convicted on two charges of manufacturing and delivery of cannabis, during a point in his life when he was using marijuana. Because he could no longer afford the legal fees for defending himself against these convictions, his father had recently died, and he was trying to support his children while his ex-wife was abusing drugs, he pled guilty and successfully served 18-months probation.

36. Love, now a 49 year old father of three, has been drug free since his arrest more than 20 years ago. He has completed coursework in electrical wiring and

electronics. He has received a certificate from ITT Career Training Center. He also has graduated from the Medical Career Institute electroneurodiagnostic ("END") technician program. Despite these qualifications and credentials, Love's convictions have prevented him from securing employment at hospitals in an END position, as well as an automotive repair job with the City of Chicago. Because of his conviction, Love cannot find steady employment that would provide health insurance and benefits to he and his daughter.

Facts Concerning Wallace

37. Vonda Wallace filed for clemency according to the appropriate Illinois Prisoner Review Board Guidelines and Illinois statutory procedures for Executive Clemency in 2003. She participated in a hearing with the Illinois Prisoner Review Board in April 2004. In 1992, Ms. Wallace, at age 27, pled guilty to possession and manufacture or delivery of cannabis.

38. It has now been 15 years since the conviction Wallace seeks to expunge. At 41 years of age, Wallace is a recovering drug addict, clean for ten years, and a single mother. However, due to her criminal record, she has been unable to secure consistent employment and has recently been informed by Presbyterian Hospital that her conviction has kept her from being hired into a permanent position.

39. Each plaintiff understands that the clemency process is not an additional avenue for appeal of his/her conviction. However, the circumstances of many of those convictions are suspicious. Many were unaware of the criminal record they would carry for years to come by agreeing to plead guilty, and lacked legal sophistication and adequate legal counsel.

COUNT I
Violation of Due Process Under
42 U.S.C. § 1983 as to All Plaintiffs

40. Plaintiffs hereby incorporate and reallege paragraphs 1-39 of this Complaint.

41. The circumstances of each plaintiff's clemency petition has been screened and vetted twice by entities familiar with the clemency statute, its redemptive intent, rehabilitative process and the interests of the State of Illinois in making convicted felons productive citizens and members of society: once by a private, non-profit organization – CGLA; and again by the board created by the State of Illinois' legislature – PRB. As evidenced by the above, each plaintiff has proven to be a candidate worthy of consideration for clemency by the Governor.

42. The Governor is vested with the authority to make final decisions on clemency petitions submitted according to proper Illinois Prisoner Review Board Guidelines as outlined by the State of Illinois' Constitution and Illinois statutory law. The authority to

decide clemency petitions is an act within the Governor's official capacity.

43. The State of Illinois has created a clemency procedure that confers rights on petitioners that are time-sensitive and protectable. The clemency procedures established by the Illinois Constitution and Illinois statutes, by themselves and through application of the Due Process clause, require the Governor to reach a decision on clemency petitions within a reasonable period of time.

44. The Governor did not and, in the case of Love, Mack, and Wallace has not, rendered a timely decision on plaintiffs' clemency petitions. Plaintiff Ernest Jones filed his clemency petition in October 2002; plaintiff Vonda Wallace filed her petition in 2003; plaintiffs Stephanie Bowens and Percy Mack filed their petitions in August 2003; plaintiff Robert Lozano filed his petition in September 2003; plaintiff Kevin Little filed his petition in October 2003; plaintiff Denise Smith filed her petition in May 2004; plaintiff Eric Love filed his petition in November 2004; plaintiffs Charles Thomas, Albert Pulido, and James Corbin filed their petitions in July 2004; and plaintiff Larry Green filed his petition in January 2005. As set forth above, each plaintiff has suffered, and continues to suffer, measurable, identifiable harms because of the undue delay in waiting for a decision.

45. The Governor's actions violate plaintiffs' Due Process rights, protected by the Fifth and Fourteenth

Amendments to the Constitution of the United States, the Constitution of Illinois, Illinois statutory law and 42 U.S.C. § 1983.

46. As already stated (*see supra* ¶ 11), on February 23, 2007, Governor Blagojevich denied the clemency petitions of plaintiffs Stephanie Bowens, James Corbin, Larry Green, Ernest Jones, Robert Lozano, Albert Pulido, Denise Smith, and Charles Thomas. These plaintiffs continue to maintain viable Due Process claims on the basis of the "capable of repetition, yet evading review" doctrine.

COUNT II
Violation of Due Process Under 42 U.S.C. § 1983 as to Plaintiffs Bowens, Corbin, Green, Jones, Lozano, Pulido, Smith, and Thomas

47. Plaintiffs hereby incorporate and reallege paragraphs 1-46 of this Complaint.

48. After this lawsuit was filed, Governor Blagojevich denied the clemency petitions of plaintiffs Stephanie Bowens, James Corbin, Larry Green, Ernest Jones, Robert Lozano, Albert Pulido, Denise Smith, and Charles Thomas.

49. The circumstances of Governor Blagojevich's denials of these petitions, and prior correspondence from Deputy General Counsel Matthew Ryan evincing official hostility to CGLA's request for action on

clemency petitions, raise questions whether the denials were in retaliation for these plaintiffs' exercise of their Due Process rights in this lawsuit, as plaintiffs believe.

50. Governor Blagojevich's denials of these petitions in this manner violated plaintiffs' Due Process rights.

RELIEF REQUESTED

a. Plaintiffs demand judgment against Defendant Governor Rod Blagojevich for an injunction requiring him to act on clemency petitions within a reasonable period of time, including the petitions of Plaintiffs Mack, Love, and Wallace;

b. Plaintiffs demand judgment against Defendant Governor Rod Blagojevich for an injunction requiring him to disclose the reasons for and processes used for denying the petitions of Plaintiffs Bowens, Corbin, Green, Jones, Lozano, Pulido, Smith and Thomas to determine if they are appropriate and consistent with the Due Process clause;

c. Plaintiffs demand their attorneys fees and costs of this action; and

d. Plaintiffs demand all other relief as the Court deems just and equitable.

Dated: April 2, 2007 Respectfully submitted,

Stephanie Bowens, Denise Smith, Kevin Little, Larry Green, Charles Thomas, Albert Pulido, James Corbin, Ernest Jones, Robert Lozano, Percy Mack, Eric Love, and Vonda Wallace

By: /s Charles C. Jackson
One of the Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true and correct copy of **PLAINTIFFS' AMENDED COMPLAINT** was served via the Court's CM/ECF (Electronic Cases Filing) System on:

Peter Chadwell Koch
LeeAnn Richey
Office of the Attorney General
100 West Randolph Street
Chicago, IL 60601
(312) 814-7203

on this 2nd day of April, 2007.

/s Gregory P. Abrams
Gregory P. Abrams